INDEX.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 120.

THE UNITED STATES OF AMERICA, *Appellant,*

vs.

T. H. DUNN, N. E. DUNN, DON RUSSELL, *ET AL.*, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *on* BEHALF *of* APPELLANT.

Nature and Result of the Action.

This is an appeal by the United States from a decree rendered by the United States Circuit Court of Appeals for the Eighth Circuit on March 28, 1923, affirming a decree entered in the case by the United States Court for the Eastern District of Oklahoma on June 7, 1921, dismissing plaintiff's bill of complaint.

The action was originally filed on the 9th day of September, 1919, in the latter court under direction of the Attorney General and at the request of the Secretary of the Interior. The purpose of the suit was to set aside an oil and gas lease executed on the 19th day of August, 1913, by A. N. Thomas, guardian of Allie Daney, a full-blood Choctaw Indian minor, to T. H. Dunn and J. Robert Gillam, covering a 40-acre tract of land in the Healdton oil field in Carter County, Oklahoma.

It was alleged in the bill of complaint that the land was a part of the restricted allotment of the Indian minor and was reserved by law from alienation and encumbrance, and that the proceeds from oil and gas produced from the premises were also reserved from alienation and encumbrance by the allottee or her guardian, except by the consent of the Secretary of Interior, and that the funds derived from oil and gas produced therefrom were required by law to be deposited in the office of the Superintendent of the Five Civilized Tribes for the use and benefit of the allottee; that A. N. Thomas was appointed guardian of the minor, Allie Daney, on the 24th day of July, 1911, by the County Court of Le-Flore County, in the State of Oklahoma, and that the lease was recorded in the office of the county clerk of Carter County, Oklahoma, in the month of February, 1914, and that about the same time an assignment of the lease from T. H. Dunn and J. Rob-

ert Gillam to the Bull Head Oil Company was also recorded in the office of the clerk of that court. It was alleged that the lease had been procured by fraud, and that therefore it and the assignment thereof to the Bull Head Oil Company were illegal and void for the reasons hereinafter more fully set forth. (Copy of lease, Trans. 16-24; Assignment, Trans. 24-25.)

T. H. Dunn and his wife, N. E. Dunn, J. Robert Gillam and his wife, Mrs. J. Robert Gillam, Don Russell, L. S. Dolman, Erret Dunlap, Jake L. Hamon, J. S. Mullen, E. L. McCain, F. M. Adams and the Bull Head Oil Company were made defendants in the action and an accounting against them was sought for the proceeds of the oil and gas taken from the leased premises, and in the alternative it was prayed that if for any reason the court should hold that the lease could not be cancelled, then that the defendant's stockholders in the Bull Head Oil Company be adjudged to hold the stock in trust for Allie Daney, and Allie Daney be declared to be the rightful owner thereof, and that the plaintiff be awarded the custody thereof for her use and benefit; that the Bull Head Oil Company be required to account for all the oil and gas taken from the said premises and for the proceeds thereof, and that the other defendants who are or at any time have been stockholders in the Bull Head Oil Company be required to account for all moneys received by them

respectively, either as dividends or as proceeds of the sale of their stock.

It was alleged that the fraud which entered into the procurement and execution of the oil and gas lease consisted of an agreement entered into by the guardian, A. N. Thomas, as lessor, and T. H. Dunn and J. Robert Gillam as lessees, by which the oil and gas lease was to be taken in the name of T. H. Dunn and J. Robert Gillam, but that they should hold for the personal and private use and benefit of A. N. Thomas, the guardian, an undivided one-fourth interest in the lease, the agreement in this particular being verbal and covered up and secretly held and carried in a written contract in the name of J. J. Thomas, who was the father of A. N. Thomas; that A. N. Funkhouser, Earl McGowen, and D. Thomas, an uncle of A. N. Thomas, were to have and hold jointly an undivided one-fourth interest therein, and that an agreement in writing to that effect was entered into by them with the defendants, T. H. Dunn and J. Robert Gillam; that it was agreed that T. H. Dunn and J. Robert Gillam should organize a corporation to be known as the Bull Head Oil Company with a capital stock of $18,000.00, one-fourth of which after setting aside $2000.00 worth of the stock to other parties as hereinafter explained, should be issued to J. J. Thomas for the sole use and benefit of the guardian, A. N. Thomas, and one-half of the capital stock was to be issued to T. H. Dunn and J.

Robert Gillam, and one-fourth should be issued to Funkhouser, D. Thomas and McGowen; that the said Funkhouser, A. N. Thomas, Earl McGowen, D. Thomas and J. J. Thomas never paid anything of value to the said A. N. Thomas, as guardian of Allie Daney, for the interests which they were to receive in the oil and gas lease, nor for the stock of the Bull Head Oil Company, and that said agreement between A. N. Thomas, Funkhouser, T. H. Dunn, J. Robert Gillam, J. J. Thomas, Earl McGowen and D. Thomas was illegal and fraudulent, and was made for the purpose of cheating and defrauding the minor, Allie Daney, out of her rights in and to said oil and gas lease and premises, and that said oil and gas lease, on account of said fraudulent agreement, is fraudulent, illegal and void; that a part of the agreement resulting in the execution of the oil and gas lease was that application should be made to the county judge of LeFlore County for an order to sell the lease to T. H. Dunn and J. Robert Gillam, and for an order approving the sale thereof, and that the county judge and County Court of LeFlore County should not be informed of the terms, conditions and provisions of said agreement or the secret interests which the said Funkhouser, McGowen, J. J. Thomas, D. Thomas and A. N. Thomas were to have and hold in the same, or in the capital stock of said corporation after it was organized, and that in accordance with such agreement T. H. Dunn and A. N. Thomas made application to the

county judge and County Court of LeFlore County, Oklahoma, for authority to the guardian to execute the oil and gas lease to Dunn and Gillam, and that the county judge and County Court of LeFlore County did authorize said A. N. Thomas, as guardian of Allie Daney, to execute the same, and after the execution of the same by A. N. Thomas, the county judge and County Court made an order approving it; that in granting authority for the execution of the lease and approving the same, the county judge and County Court of LeFlore County were uninformed as to the secret agreement by which the above named parties were to have and hold an interest in and to said lease and in and to the capital stock of said corporation, but all such information was concealed and withheld from said county judge and County Court by the said A. N. Thomas and T. H. Dunn. It was alleged that the concealment of such secret agreement from the county judge and County Court constituted a fraud upon the county judge and County Court and rendered the action of said county judge and County Court in authorizing the execution of said lease and the approval of the same, illegal and void. That immediately thereafter the said T. H. Dunn, J. Robert Gillam, and A. N. Thomas, as guardian of the said Allie Daney, caused the lease to be presented to Dana H. Kelsey, United States Indian Superintendent at Muskogee, Oklahoma, for his consideration, and for the purpose of having the same transmitted to and approved by the

Secretary of the Interior; that valid orders of the county judge and County Court of LeFlore County authorizing the execution of the lease and the approval thereof by the county judge and County Court were legal prerequisites to the consideration and approval of the same by the Indian Superintendent and Secretary of Interior. That as a part of their application for the approval of the oil and gas lease and in conformity with the rules and regulations of the Secretary of Interior, the said T. H. Dunn and J. Robert Gillam made under oath, among others, the following statement:

> "The applicant solemnly swears that the lease, for which approval is requested, is taken in good faith in the interest and for the exclusive benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the benefit of, any other person, corporation or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein."

That the Superintendent, not being otherwise informed, believed the statements thus made under oath to be true, and acting thereon, recommended the approval of the lease, and that the Secretary of the Interior and his assistant, Lewis C. Laylen, not being otherwise informed, believed said statement under oath and relying thereon approved the lease; that the concealment by the guardian, A. N. Thomas, and T. H. Dunn and J. Robert Gillam from the Indian

Superintendent and from the Secretary of Interior of the secret interests held by A. N. Thomas and the other parties above mentioned in said lease, and the making under oath of the above statement, constituted a fraud upon said Indian Superintendent and upon the Secretary of the Interior, and rendered the approval of the lease illegal and void.

It was further alleged that the said guardian, A. N. Thomas, could have made a much more valuable lease for the use and benefit of said minor, Allie Daney, and could have procured for her a bonus of at least $10,000.00 for the lease.

That in connection with the application for the approval of the lease by the Secretary of Interior, the said T. H. Dunn and J. Robert Gillam presented to the Indian Superintendent an assignment of the lease to the Bull Head Oil Company, which assignment was in due time approved by the Secretary of Interior, but at the time he approved the same he had no knowledge of the fraudulent agreement above mentioned by which the guardian, A. N. Thomas, and others were to have and hold undivided interests in the lease or in the stock of the Bull Head Oil Company, and that the concealment of the facts as above set forth from the Secretary of Interior, which rendered the procurement and execution of the lease fraudulent, illegal and void, also rendered the approval of the assignment by him illegal and void.

It was also alleged that on that same day A. N. Thomas, as guardian, executed the lease to T. H. Dunn and J. Robert Gillam, J. J. Eaves of Ardmore who had on the 8th day of November, 1905, been appointed curator of the minor Allie Daney by the United States Court for the Indian Territory, executed in favor of J. S. Mullen an oil and gas lease covering the same tract of land; that J. S. Mullen presented the lease executed by Eaves as curator, to the United States Indian Superintendent at Muskogee, Oklahoma; that the presentation of this lease to the Indian Superintendent, while the other lease was pending before him, resulted in a contest before the Indian Superintendent as to which of said leases should be approved; that after the organization of the Bull Head Oil Company the respective lessees effected a compromise agreement, as a result of which J. S. Mullen withdrew his application for the approval of the lease executed by J. J. Eaves as curator, so far as the land embraced in the lease executed by A. N. Thomas was concerned, and the said Mullen subsequently abandoned the said lease to himself, and requested that the same be disapproved by the Secretary of Interior, which was accordingly done, and that the said J. J. Eaves as curator also executed the A. N. Thomas lease; and it was further alleged that no consideration or agreement was paid to the said J. J. Eaves as curator for his joining in the execution of the lease executed by A. N. Thomas, and that his signature as such curator to said

lease was wholly illegal and void, but notwithstanding the void character of such act on the part of said J. J. Eaves, the same was made the basis of an agreement on the part of the Bull Head Oil Company and the said T. H. Dunn and J. Robert Gillam, who controlled said corporation on the one hand and J. S. Mullen on the other, whereby 8000 shares of the capital stock of said corporation was to be issued to the said J. S. Mullen and his associates; that pursuant to the illegal agreement which resulted in the procurement and execution of the lease by A. N. Thomas to T. H. Dunn and J. Robert Gillam, and pursuant to the illegal agreement between the Bull Head Oil Company, T. H. Dunn, J. Robert Gillam and J. S. Mullen, the capital stock of the Bull Head Oil Company was issued as follows: To J. W. Gladney 1000 shares, in consideration of an oil and gas lease covering a five acre tract of land not connected in any way with the Allie Daney land; to J. S. Mullen for himself and associates, 8000 shares; to T. H. Dunn, trustee, 8000 shares; to L. S. Dolman, 1000 shares; that of the stock issued to T. H. Dunn as trustee, certain shares were later transferred as follows, to-wit: To N. E. Dunn 1500 shares; to T. H. Dunn 500 shares; to J. Robert Gillam 2000 shares; to Earl McGowen 666-2/3 shares; to A. N. Funkhouser 666-2/3 shares; to T. H. Dunn, trustee for D. Thomas 666-2/3 shares; to T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas 2000 shares; that in the latter part of the year 1914, T. H. Dunn and J. Robert

Gillam bought 2000 shares of said capital stock held by T. H. Dunn, trustee for J. J. Thomas and A. N. Thomas, and as consideration therefor, in addition to cash paid and an automobile delivered to said A. N. Thomas they caused a deed to a tract of 200 acres of land in Carter County, Oklahoma, to be made to P. C. Dings, who secured a loan thereon, the proceeds of which were paid to A. N. Thomas, and who thereafter conveyed the land to J. J. Thomas to be held for A. N. Thomas. (The bill of complaint is set out in full at pages 1-16 of transcript.)

The different defendants answered denying all the allegations in the bill of complaint charging fraud in the execution and procurement of the lease, or any knowledge of the fraud, and owing to the fact that the evidence tended strongly to show, and the trial court held, that all of the defendants except T. H. Dunn and his wife and J. Robert Gillam and his wife were innocent purchasers of the lease and of the stock in the Bull Head Oil Company, it will not be necessary to consider their answers in detail, but T. H. Dunn and his wife and J. Robert Gillam and his wife set up certain affirmative defenses which it is necessary to consider. They alleged that the lease in controversy was procured for them by A. N. Funkhouser, and that if any fraud was perpetrated it was perpetrated by him without their knowledge or consent, that it was agreed between them and Funkhouser that if a lease was procured by him from

A. N. Thomas, guardian of Allie Daney, on the tract of land in controversy it should be taken in their name, but that they would hold for his use and benefit an undivided one-half interest in the lease and that he had the right to do as he pleased with this undivided one-half interest, that if A. N. Thomas and D. Thomas and Earl McGowen had any interest in the lease it was by reason of an agreement between them and A. N. Funkhouser of which Dunn and Gillam had no knowledge, and they alleged in substance that the same arrangement with respect to the stock in the Bull Head Oil Company was made, as it was agreed that that company should be organized and that any interest which A. N. Thomas and the other parties named had in the stock of the Bull Head Company was the result of the agreement with Funkhouser in dealing with his undivided one-half interest in the lease. They also alleged that the sale of the lease was regularly made by the County Judge of LeFlore County and that they were the highest bidders therefor, and the lease was sold them and approved by the County Judge, and that no fraud of any character known to them was perpetrated to procure the lease or its approval; that after the lease was procured they presented the same to Dana H. Kelsey, United States Indian Superintendent, for approval by the Secretary of Interior. They also alleged that on the same day the lease was executed by A. N. Thomas, another lease was executed by J. J. Eaves, curator of the estate of Allie Daney

on the same tract of land to J. S. Mullen, which lease was executed according to law and upon blank forms provided by the Secretary of Interior and was duly presented to Dana H. Kelsey, United States Indian Superintendent, that T. H. Dunn and J. Robert Gillam and Mullen were notified by Kelsey of the conflict between the leases, and a hearing was had to determine which should be approved, that Kelsey decided that he would reject both leases unless the parties agreed among themselves as to which should have the lease; that he would not recommend either lease for approval unless both the guardian and curator executed the same, and that unless an additional bonus of $2,000.00 was paid by the lessees, that Dunn and Gillam and Mullen finally reached an agreement by which a corporation was organized known as the Bull Head Oil Company with a capital stock of $18,000.00 and that either lease would be recommended for approval if it was executed by both guardian and curator and the $2,000.00 bonus paid, and the lessees in said lease should transfer their interest in the same to the corporation, that all of this was done and a lease held by J. S. Mullen on five acres of land was also assigned to the corporation; that J. J. Eaves was and had been for a long time curator of the estate of Allie Daney, legally appointed and qualified, and was such when the said Thomas was appointed guardian, and that he remained curator after Oklahoma was admitted into the Union, and

until he resigned, which was after the execution of the lease.

Dunn and Gillam further alleged that on the 27th day of January, 1924, Dana H. Kelsey, Indian Superintendent, recommended that the lease and the assignment thereof to the Bull Head Oil Company, executed by Thomas, guardian, and Eaves, curator, be approved by the Secretary of the Interior (Tr. 45-49).

The defendants J. Robert Gillam and his wife also set up substantially the same affirmative defenses as were set up by Dunn and his wife (Tr. 49-52).

Evidence in Trial Court.

On the trial of the case which was begun on the 26th day of April, 1920, the evidence overwhelmingly sustained the allegations of fraud in the procurement and execution of the lease. The guardian A. N. Thomas who was a witness for the plaintiff testified fully, giving the details of the fraudulent arrangement by which he made an agreement with T. H. Dunn, acting for himself and his partner J. Robert Gillam, in which he was to receive an undivided one-fourth interest in the lease for his personal and private benefit and that his interest in the lease was to be covered up in a written agreement and carried in the name of his father J. J. Thomas, that later the interest which he was to have in the

lease was by parole agreement with Dunn reduced from one-fourth to one-eighth, and when the Bull Head Oil Company was organized the agreement was further executed by T. H. Dunn and J. Robert Gillam in an arrangement by which 2000 shares of the capital stock of the Bull Head Oil Company of the par value of $1.00 per share was held in the name of T. H. Dunn for the personal and private benefit of the guardian A. N. Thomas, and that later in the months of August and September, 1915, the fraudulent arrangement was consummated by the payment to him by Dunn and Gillam of $3500.00 in money and the delivery to him of a Saxon automobile.

The testimony of other witnesses corroborated this testimony in every particular, and owing to the fact that the trial judge in his findings of fact sustained all the allegations in the bill of complaint with reference to the fraudulent procurement and execution of the lease, and owing to the further fact that the United States Circuit Court of Appeals agreed with the trial court as to the fraud which entered into the procurement and execution of the lease, we do not deem it necessary to quote or discuss the testimony in further detail. We content ourselves by setting out in full the rather elaborate findings of fact which were filed in the court below by Judge WILLIAMS.

Findings of Fact by the Trial Court.

On the 20th day of October, 1920, Judge Williams filed in his court, what he designated as "Memorandum of Finding," which is set forth in full at pages 65 to 70 of the transcript. After stating that the action was brought to set aside an oil and gas lease on the ground of fraud, the lease covering forty acres of land belonging to Allie Daney, a full-blood Choctaw Indian, the judge found that on the 8th day of November, 1905, J. J. Eaves was appointed curator of the estate of Allie Daney by the United States Court for the Southern District of the Indian Territory sitting in probate, and that after the erection of the State of Oklahoma, the curatorship proceedings were duly transferred to Love County, Oklahoma, and that Eaves as curator, on the 18th day of August, 1913, executed an oil and gas lease to J. S. Mullen covering the forty acre tract of land belonging to the minor and presented the lease to Dana H. Kelsey, Superintendent of the Five Civilized Tribes, for approval. That on the 24th day of July, 1911, A. N. Thomas, was appointed guardian of the minor, Allie Daney, by the County Court of LeFlore County, Oklahoma, and that he immediately qualified and entered upon the discharge of his duties as such guardian and at the time of the institution of this suit he was acting as such guardian. That on the 18th day of August, 1913, A. N. Thomas as such guardian, executed an

oil and gas lease to T. H. Dunn and J. Robert Gillam covering the same tract of land.

Judge Williams found as a part of the consideration moving to A. N. Thomas to execute the lease to T. H. Dunn and J. Robert Gillam, T. H. Dunn transferred to J. J. Thomas, for the use and benefit of A. N. Thomas, an undivided one-fourth interest in the oil and gas lease, or in writing agreed that J. J. Thomas should have such interest and it was a secret understanding that it should be for the personal benefit of A. N. Thomas, and that T. H. Dunn and J. Robert Gillam also agreed in writing that Earl McGowan, D. Thomas and A. N. Funkhouser should also have an undivided one-fourth interest in the lease. The remaining one-half interest in the lease was to be held and owned by T. H. Dunn and J. Robert Gillam. That the lease executed by Thomas to Dunn and Gillam was also filed with Dana H. Kelsey, Superintendent for the Five Civilized Tribes, for approval but that he declined to approve either of the leases as long as there was controversy as to who was the *de jure* guardian of the estate of Allie Daney. He also found that Dana H. Kelsey, acting as Superintendent for the Five Civilized Tribes, suggested to the holders of the respective leases that they organize a corporation and call it the Bull Head Oil Company, the holders of the respective leases each to have one-half of the stock of the company, and that J. J. Eaves as curator of the estate of Al-

lie Daney join in the lease executed or to be executed by A. N. Thomas, and that after the lease was appraised and its bonus value ascertained and paid, that he would approve the lease so executed and assigned to the Bull Head Oil Company for whatever bonus was determined by such appraisement to be paid. He found that this plan was carried out by the parties and that an additional five acres, known as the Gladney tract, was added to the Allie Daney tract and its value included in the stock of the company at $2,000.00 and that the Allie Daney lease was valued at $16,000.00, making the total capital stock of the company $18,000.00. That the holders of the original lease from J. J. Eaves as curator, otherwise known as the Mullen interest, were to receive and did receive $8,000.00 of the capital stock of the Bull Head Oil Company, and the holders of the original A. N. Thomas lease, otherwise referred to as the Dunn and Gillam interest, were to and did receive $8,000.00 of the capital stock of the company. L. S. Dolman and Gladney each received $1,000.00 of the original stock of the company, represented by the additional five acre lease referred to above. The stock of the Mullen interest was issued to J. S. Mullen, Errett Dunlap and L. S. Dolman and the stock was represented by the Dunn and Gillam interest was issued to T. H. Dunn, as trustee. That prior to this arrangement T. H. Dunn had conferred with A. N. Thomas, J. J. Thomas, McGowan, D. Thomas and Funkhouser and explained to them the neces-

sity of reducing their holdings on account of the arrangement suggested by Kelsey and in accordance with the negotiations which brought about the approval of the lease, so that in place of Thomas having a one-fourth interest, it would be a one-eighth interest, and the same arrangement was made by Dunn as to the one-fourth interest of Funkhouser, McGowan and D. Thomas. That afterwards T. H. Dunn and J. Robert Gillam acquired the interest held in the name of J. J. Thomas, the transaction being negotiated and concluded with A. N. Thomas and the D. Thomas and Earl McGowan interest in the stock was sold to Dunlap. Afterwards J. Robert Gillam sold his holdings in the stock of the company to Jake Hamon for $75,000.00, representing 3,266-2/3 shares, of which his wife, Mrs. Gillam, at that time held 1,-266-2/3 shares. That the defendant, T. H. Dunn, still has his holdings in the company. At the time of the negotiations which brought about the transfer of the Allie Daney lease executed by A. N. Thomas, guardian, and later joined in by J. J. Eaves as curator, neither J. J. Eaves as guardian, Frank Adams, Errett Dunlap, L. S. Dolman, J. W. Gladney nor any of the holders of the original J. J. Eaves curator lease knew of any secret agreement on the part of Dunn and Gillam by which A. N. Thomas, as guardian, secured or was to secure any interest in or private benefit from the lease, nor did they have any knowledge or information that would have rea-

sonably put them on inquiry so as to ascertain such fact.

Judge Williams also held that E. L. McClain acquired the interest of A. N. Funkhouser in the stock of the company for a valuable consideration and without notice that A. N. Thomas, guardian, or J. J. Thomas or D. Thomas had or claimed any interest in the lease, and that Jake Hamon had no notice of such claim at the time he purchased for value the stock of J. Robert Gillam.

Judge Williams also found that at the time the lease was executed by J. J. Eaves, as curator, he was the regular guardian of Allie Daney's estate and that when he joined in the A. N. Thomas lease, having first been specifically authorized to that end by the County Court or probate court of Love County, Oklahoma, he was the regular guardian of her estate and that his act in joining in the lease executed by A. N. Thomas placed the oil and gas legal title in Dunn and Gillam, to be transferred to the Bull Head Oil Company subject to the approval of the lease by the Secretary of the Interior. That this had the effect of putting the oil and gas legal title in the Bull Head Oil Company, free from the legal effect of fraud in the execution of the lease by A. N. Thomas, as guardian, for he was not *de jure* guardian of the estate of Allie Daney. That while from the fair preponderance of the evidence he found there was legal fraud in the execution of the original

lease by A. N. Thomas as guardian to Dunn and Gillam by the placing of an interest in J. J. Thomas' name for the personal and private benefit of A. N. Thomas, yet he found that J. J. Eaves was the legal guardian of her estate and that the lease executed by him was the valid lease and when he joined in this Thomas lease that carried the oil and gas legal title when it had been approved by the County or Probate Court of Love County and afterwards approved by the Secretary of the Interior, that that had the effect of placing the oil and gas legal title in the Bull Head Oil Company free from fraud.

The findings thus made did not cover all the issues made by the pleadings and the evidence and the attorneys for the plaintiff on December 7th, 1920, filed in the trial court a motion asking the judge to make additional findings and in response to that motion Judge Williams, as a part of the final decree in the case, on June 7, 1921, made additional findings of fact which are set forth in the transcript at pages 76 to 77, inclusive.

The first additional fact which he found was that T. H. Dunn held in his name as trustee, shares of stock in the Bull Head Oil Company of the par value of $2,000.00 for the personal and private benefit of A. N. Thomas from the time the original stock of the company was issued until some time in the year 1915, at which time he, Dunn, and J. Robert Gillam, purchased the same from A. N. Thomas and

paid him therefor the sum of $3,500.00 in money and a Saxon automobile. He also found that at the time Kelsey suggested the formation of the Bull Head Oil Company and recommended the approval of the oil and gas lease executed by A. N. Thomas as guardian and joined in by J. J. Eaves as curator, he, Kelsey, had no knowledge of the agreement between T. H. Dunn, A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan, by which they were to have personal and private benefits in the lease nor did Kelsey, at the time he recommended the approval of the lease have any knowledge of such agreement whereby A. N. Thomas, D. Thomas, A. N. Funkhouser and Earl McGowan were to have any interest in the stock of the Bull Head Oil Company after its organization, nor did the county judge of Love County have any knowledge of any such secret agreement at the time he directed J. J. Eaves as curator to join in the lease.

He further found that when J. J. Eaves as curator of the estate of Allie Daney, on or about the 26th day of January, 1914, subscribed his name to the oil and gas lease as of date of August 19, 1913, by A. N. Thomas as guardian to Dunn and Gillam, it was the intention that J. J. Eaves should so execute the lease in joining therein as to execute a valid oil and gas lease and that the then present intention in so executing it, after it was approved by the County Court of Love County and the Secretary of

the Interior, was to make it a binding oil and gas lease on the estate of Allie Daney and that the execution by J. J. Eaves as curator and the approval by the county judge of Love County and by the Secretary of the Interior, was free from fraud and the same operated to make the lease a valid lease, said lease being for a term of ten years from the date of the approval by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities. He also found that Dunn at the time of the trial was solvent. That he was unable to determine from the evidence whether J. Robert Gillam was solvent or not and that the stock transferred by Gillam to his wife was without consideration (Tr., pp. 76-77).

In the Circuit Court of Appeals none of the defendants in error seriously denied the allegations of fraud in the procurement of the leases. In that court, the plaintiff, United States, conceded that the Bull Head Oil Company and all of the stockholders of that company, except T. H. Dunn and his wife and J. Robert Gillam and his wife, were innocent purchasers of the lease and of the stock in that company, and sought to recover in lieu of the cancellation of the lease, a money judgment against Dunn and Gillam and their wives for the value of the lease at the time of the trial, and particularly to recover against J. Robert Gillam and his wife judgment for the sum of

$75,000.00, which sum had been paid them for their stock in the company.

The Circuit Court of Appeals, as stated above, agreed with the trial court that the lease had been procured by fraud. On that point Judge LEWIS, who wrote the opinion, said:

> "On the trial the court found, and there was evidence to sustain the finding, that Thomas, under a secret agreement which he made with Dunn and Gillam, had preserved an interest in the lease. It was shown that they later paid him $3,500 and gave him a Saxon automobile for that interest.
>
> "The court, however, further found that Eaves was the minor's legal curator, that Thomas was not her guardian, and that Eaves' execution of the lease which had been theretofore signed by Thomas and its approval by the County (probate) Court of Love County rendered it a valid instrument, when later approved by the Secretary. It further found that the agreement between Dunn and Gillman and Thomas constituted legal fraud on the part of defendants, Dunn and Gillam, but that it was not actionable because Thomas was without authority and power to give a lease; and thereupon it dismissed the bill." (Tr. 262.)

After assuming that the lease had been procured by fraud, the Circuit Court of Appeals affirmed the judgment of the court below upon the theory that the fraud was not actionable, because in the opinion of that court the testimony did not show that the fraud injured the estate of the minor.

SPECIFICATIONS *of* ERROR.

We present the case to this court upon eighteen specifications of error, which are fully set forth at pages 267 to 272 of the transcript.

In the first, second, third, fourth, fifth, sixth, seventh and eighth specifications, we complain of the action of the trial court. These specifications are in substance that the trial court erred in holding that the appellant, the United States of America, was not entitled to recover and in dismissing its bill of complaint and in not rendering a decree in favor of the appellant holding illegal and void as against T. H. Dunn and J. Robert Gillam the oil and gas lease dated August 18, 1913, executed by A. N. Thomas, guardian of Allie Daney, and in not rendering a decree requiring T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, to account for all moneys received by them as proceeds from the oil and gas derived from the premises covered by the oil and gas lease, and as dividends on stock held by them in the Bull Head Oil Company and in not rendering a decree holding that since Dunn and Gillam assigned the lease to the Bull Head Oil Company and since the Bull Head Oil Company paid value therefor and became an innocent purchaser of the lease, that Dunn and Gillam were liable in damages for the value of the lease at the time of trial.

That the trial court erred in holding that the lease was rendered valid and binding on the estate of Allie Daney because J. J. Eaves, as curator of the estate of Allie Daney, attached his signature as such curator to the lease and acknowledged the execution of the same before a notary public and in not holding that the oil and gas lease was illegal and void as against T. H. Dunn and J. Robert Gillam and their wives, notwithstanding the fact that J. J. Eaves, as curator of the estate of Allie Daney attached his signature to and acknowledged the same.

That the trial court erred in not holding the oil and gas lease illegal and void for the reason that the same was procured by the fraudulent agreement entered into by and between T. H. Dunn and J. Robert Gillam and A. N. Thomas, guardian of Allie Daney, whereby it was agreed that A. N. Thomas was to have and hold for his personal and private use an undivided one-fourth interest in the lease, which interest was agreed to be held and carried in the name of J. J. Thomas, father of A. N. Thomas, and which fraudulent agreement was further carried into effect by a subsequent arrangement whereby the interest of A. N. Thomas was reduced to a one-eighth interest in the oil and gas lease and which fraudulent agreement was further carried into effect by T. H. Dunn and J. Robert Gillam and A. N. Thomas in that it was agreed that the Bull Head Oil Company when organized, T. H. Dunn should hold in his name

as trustee for A. N. Thomas, stock which was the equivalent of the one-eighth interest in the oil and gas lease and that T. H. Dunn did hold in his name as trustee stock in the company of the par value of $2,000.00 for the personal and private use and benefit of A. N. Thomas, and that afterwards, to-wit, in the months of August and September, 1915, the fraudulent agreement was finally consummated by the payment to A. N. Thomas for his personal and private use and benefit, the sum of $3,500.00 in money and a Saxon automobile.

That the trial court also erred in not rendering judgment in favor of the United States against Dunn and Gillam and their wives for all moneys received by them or any of them for the proceeds of oil and gas derived from the premises covered by the lease and also dividends on stock of the Bull Head Oil Company received by them or any of them and that the trial court erred in not holding that T. H. Dunn and his wife held the stock issued to them in the Bull Head Oil Company as trustees, for the benefit of the United States of America, and in not decreeing the sale thereof for the use and benefit of the United States of America.

In the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth specifications of error we complain of the action of the United States Circuit Court of Appeals in dismissing the appellants' appeal as to the Bull

Head Oil Company and the other appellees other than T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, and that the Circuit Court of Appeals erred in considering the recitals in the motions of T. H. Dunn and his wife, M. E. Dunn, and J. Robert Gillam and his wife, Mrs. J. Robert Gillam, to dismiss the appeal herein on the merits of the case, and erred in taking into consideration the recitals in said motions in determining the case on its merits, for the reason that the motion to dismiss the appeal constituted no part of the record proper and the United States Circuit Court of Appeals was not authorized under the law to consider the recitals in said motion to dismiss the appeal when determining the merits of the controversy, and that that court erred in holding that the compromise settlement between the United States and the Bull Head Oil Company had the effect of confirming the oil and gas lease in controversy; that that court erred in holding that the lease was executed for a full and adequate consideration and that the estate of Allie Daney, for whom this suit was brought, was not damaged or injured by reason of the fraud perpetrated by Dunn and Gillam in procuring the lease from her guardian and in not holding that the fraud perpetrated by them vitiated the lease as to Dunn and Gillam and their wives and rendered the same null and void. That the evidence having conclusively shown that the lease executed by A. N. Thomas on the 18th day of August,

1913, to T. H. Dunn and J. Robert Gillam was procured by fraudulent means in that it was agreed that A. N. Thomas, the guardian, was to have and to hold a secret and private interest in the lease, consisting first of a one-fourth interest, which subsequently was reduced to a one-eighth interest, which fraudulent agreement was carried into execution when the Bull Head Oil Company was formed and T. H. Dunn held in his name as trustee two thousand shares of stock of said company for the use and benefit of Thomas and was further executed in the months of August and September, 1915, when Dunn and Gillam purchased the interest of A. N. Thomas in the stock of the company and paid A. N. Thomas therefor $3,-500.00 in money and gave him a Saxon automobile, the United States Circuit Court of Appeals erred in not holding the lease illegal and void insofar as T. H. Dunn and J. Robert Gillam and their wives are concerned. That court also erred in not holding at the time J. J. Eaves as curator, signed the oil and gas lease executed by A. N. Thomas, the lease had a rental value of from four to six hundred dollars an acre and the aggregate lease value of from sixteen to twenty-four thousand dollars and in not holding that the mere attaching of the name of J. J. Eaves as curator to the lease executed by A. N. Thomas and the approval of the lease by the County Court of Love County and the Secretary of the Interior did not validate the lease and in not holding that the lease having been procured by fraud and the fraud

not having been extracted therefrom or condoned, the lease was at all times null and void insofar as T. H. Dunn and J. Robert Gillam and their wives are concerned and in not holding that T. H. Dunn and J. Robert Gillam were liable in damages for the fraud perpetrated by them in procuring the lease and in not holding them subject to an accounting for the value of the lease at the time of the trial in the court below, and that the United States Circuit Court of Appeals erred in not reversing the decree of the court below.

PRELIMINARY STATEMENT.

After the trial court had held that the Bull Head Oil Company was an innocent purchaser for value of the oil and gas lease in controversy and that all the stockholders of that company except Dunn and Gillam and their wives were innocent purchasers of the stock, the Bull Head Oil Company on the 22nd day of August, 1921, submitted in writing to the Attorney General, an offer of compromise in which it offered to turn over to the Superintendent of the Five Civilized Tribes seven-sixteenths of the oil produced from the lease until the full sum of $45,000.00 was paid, the money to become the property of Allie Daney, the beneficiary of the suit, and to be deposited in the office of the Superintendent of the Five Civilized Tribes along with other money realized from the premises, and in addition thereto to pay attorney's fees in the sum of $12,500.00. This offer of compromise was subject to the following condition:

> "This proposition is made with the understanding that in any appeal which the United States may prosecute from the decision of United States Court for the Eastern District of Oklahoma in the above filed cause to the United States Circuit Court of Appeals or to the Supreme Court of the United States, the United States will neither ask nor insist upon a reversal of said cause or a recovery against the Bull

> Head Oil Company or against any of the defendants in said cause, save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam, and that it will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded" (Tr. 256-257).

The offer was approved by the Attorney General, and the Interior Department, the compromise has in all respects been carried into effect, and the money paid into the office of the Superintendent of the Five Civilized Tribes for the benefit of the minor.

The rights of the Bull Head Oil Company and its stockholders other than Dunn and Gillam and their wives, in view of the compromise, are not involved in this appeal.

In the sixth, seventh and eighth assignments of error on appeal to the United States Circuit Court of Appeals error is charged because the court did not render judgment against T. H. Dunn and his wife N. E. Dunn and J. Robert Gillam and his wife Mrs. J. Robert Gillam, but no relief is sought against the Bull Head Oil Company and its other stockholders. The only relief sought on this appeal to the Supreme Court of the United States is against

Dunn and Gillam and their wives (Tr. 241-244 and 271).

No compromise with Dunn and Gillam could be justified. The overwhelming weight of the evidence and the findings of the trial court concurred in by the Circuit Court of Appeals show that on the 19th day of August, 1913, they entered into a corrupt agreement with A. N. Thomas the guardian of the Indian minor who is a ward not only of A. N. Thomas, but also of the United States, by which they bribed him to execute an oil and gas lease on a tract of land belonging to the ward. This agreement was continuously in the minds of the parties from that time until in the months of August and September, 1915, when it was consummated and the bribe, consisting of $3500.00 in money and a Saxon automobile, was paid. The uncontradicted evidence shows that but for this corrupt agreement a bonus of from sixteen thousand to twenty-four thousand dollars could have been obtained for the lease; whereas, on account of the corrupt agreement and the complications resulting therefrom, only a bonus of $2070.00 was obtained.

The government owes a most solemn duty to protect thousands of Indian minors in Oklahoma, in the administration of their estates involving many millions of dollars, and every consideration of right, justice and public policy forbids compromise with persons who, by fraud, induce the guardians of such

wards to betray their trusts. On the other hand the government is under a pressing duty and obligation to expose fraud of all kinds when perpetrated in connection with the administration of such trusts.

The record in this case shows that Dunn and Gillam were the active perpetrators of the fraud, and that by the decree of the courts below they have been permitted to profit by their fraud to the extent of approximately two hundred thousand dollars.

The government insists that Dunn and Gillam, occupying as they do a fiduciary relation to the estate of the minor, should not be permitted to thus profit by their fraud, and that they should be held to a full accounting for all profits made by them out of this transaction. It will be noted that the trial court held the original lease executed by A. N. Thomas to Dunn and Gillam on August 19, 1913, illegal and void upon the theory that the appointment of Thomas as guardian was unauthorized by law; but that the lease became valid and was rendered *free of fraud* by the fact that J. J. Eaves curator of the estate of Allie Daney attached his name to the lease on January 26, 1914 (Tr. 69 and 77). The Circuit Court of Appeals however held the lease valid because the fraud perpetrated by Dunn and Gillam was of no detriment to the estate of the minor and therefore not actionable (Tr. 263-264).

Contest before the Indian Superintendent between Dunn and Gillam holding lease executed by A. N. Thomas, guardian of Allie Daney, and J. S. Mullen holding lease executed by J. J. Eaves, curator of Allie Daney. (Tr. 169.)

It appears that on the 19th day of August, 1913, shortly after oil was discovered in Carter County, Oklahoma, J. S. Mullen, at Marietta, Love County, Oklahoma, procured an oil and gas lease from J. J. Eaves curator of the estate of Allie Daney, and that on the same day Dunn and Gillam procured a lease from A. N. Thomas, the guardian, at Poteau, LeFlore County, Oklahoma. These two leases were promptly presented to the Indian Superintendent Kelsey for transmission to the Secretary of Interior for approval. Thereupon a protracted scramble began before the Indian Superintendent (Tr. 104-5 and 169 to 198, also 199-205). Neither lease was of any validity whatever until approved by the Secretary of the Interior.

Section 2 of the Act of May 27, 1908 (35 Stat. 312), is the sole authority for the execution of the lease in controversy, and it provides in substance that leases on restricted lands of Indian minors for oil, gas or other mining purposes may be made by their guardians *"with the approval of the Secretary of Interior under rules and regulations provided by the Secretary and not otherwise" (Jackson* v. *Gates Oil Company*, 297 Fed. 549).

This scramble resulted in a compromise in the month of January, 1914, between those holding under the Thomas lease and those holding under the Eaves lease, by which an additional bonus of $2,000.00 was to be paid out of oil produced from the premises, and a corporation was to be organized with a capital stock of $18,000.00, $16,000.00 of which was to be divided equally between the respective factions engaged in the scramble (see testimony of Indian Superintendent, Kelsey, Tr. 216). It was also agreed that J. J. Eaves should join in the execution of the lease previously executed by Thomas, and then resign his curatorship; and that the lease should be assigned to the Bull Head Oil Company.

The undisputed testimony of Frank Adams (Tr. 160), Erret Dunlap (Tr. 164) and P. C. Dings (Tr. 158) is that the land at that time had a lease or bonus value of from four to six hundred dollars an acre, or an aggregate lease or bonus value of from sixteen to twenty-four thousand dollars. The testimony of J. S. Mullen with reference to value of the lease is significant. He says:

> "I know what the departmental lease on the Allie Daney land was worth the latter part of January, 1914; it was worth about the capital stock of the company, that is, about $18,000.00" (Tr. 161-162).

We cannot read the evidence with reference to the contest before the Indian Superintendent and

the compromise made under his direction, and escape the conclusion that with the consent of the Superintendent, the parties to the compromise *appropriated the lease or bonus value of this minor's land in January, 1914, to their own use and benefit, and made it the basis for the issuance of the capital stock of the Bull Head Oil Company*—one-half to the Mullen faction and the other one-half to the Dunn and Gillam faction. In fact they boldly stipulated in writing to the effect *that in consideration of the assignment of the unapproved lease to the Bull Head Oil Company "stock shall be issued to the party of first part or such person as he may designate (the Mullen faction) in the amount of $8,000.00, and to the parties of second part, or such persons as they may designate (the Dunn and Gillam faction) stock in the amount of $8,000.00"* (Tr. 135-136).

At the time the estate of the minor was thus despoiled of the bonus value of the lease to the extent of sixteen thousand dollars' worth of the capital stock of the Bull Head Oil Company, neither Mullen nor Dunn and Gillam, holding under the respective unapproved leases, had any legal right to have the leases approved. All the Indian Superintendent had to do was to recommend the rejection of both leases and then the officers of the state and federal governments could certainly have so managed this estate as to procure for the minor an oil and gas lease with an adequate bonus. We desire to emphasize the

point that at the time this compromise was made, the estate of the minor was in no way bound, and neither Mullen nor Dunn and Gillam had any right whatever in an oil and gas lease; and that none of the parties to the transaction paid anything for the stock except to procure the assignment of this unapproved lease to the company.

In the findings of fact and conclusions of law reached by the trial judge, great stress seems to have been put on the fact that Mullen had this unapproved curator's lease and surrendered it and accepted in lieu thereof 8000 shares of the capital stock of the company. Dunn and Gillam contend that this fact aided and protected them against a decree holding the lease void and calling on them for an accounting. We most earnestly protest against the contention that this Eaves lease, unapproved and rejected at the request of Mullen, ought to have any consideration whatever in determining the validity of the other lease executed by A. N. Thomas and joined in by Eaves the curator.

ARGUMENT *and* AUTHORITIES.

First Proposition.

The oil and gas lease in controversy having been executed under a fraudulent agreement by which the guardian, A. N. Thomas, and his uncle, D. Thomas, and others were to have and own a secret interest in the lease for their personal and private use and benefit, and this agreement having been executed, the lease is fraudulent and void in so far as T. H. Dunn and J. Robert Gillam, who actively participated in the fraudulent agreement, are concerned. This proposition arising under the first, second, ninth and eighteenth errors assigned wherein complaint is made generally against the trial court for dismissing the bill and against its action in not holding the oil and gas lease void, and also against the Circuit Court of Appeals for affirming the decree of dismissal and in not reversing the case on appeal to that court.

The statutes of Oklahoma prohibit a guardian from purchasing at his own sale his ward's property. Such a purchase as between the ward and the guardian is void. It is also void as against all other persons dealing with the property with knowledge of the fraud. Judge Williams expressly found that a part of the consideration moving to A. N. Thomas to execute the lease, Dunn and Gillam, by T. H. Dunn, transferred to J. J. Thomas for the use

and benefit of A. N. Thomas, an undivided one-fourth interest in the oil and gas lease, or in writing agreed that J. J. Thomas should have such interest and it was a secret understanding that it should be for the personal benefit of A. N. Thomas; that the assignment of this interest to J. J. Thomas for the use and benefit of A. N. Thomas was executed at the same time the lease was executed and was a part of the same transaction.

It thus appears that the lease was executed upon an unlawful consideration.

Section 5521 of the Compiled Laws 1921 reads as follows:

> "The consideration of a contract must be lawful."

This subject is fully discussed in the case of *Mann* v. *Brady*, .. Okl. .., 196 Pac. 346, where it is said:

> "'Where the consideration of a contract is in part illegal, the courts as a general rule, will not determine how much of the consideration is based on the illegal consideration and enforce the contract as to the balance; but the whole contract will be deemed illegal; and enforcement thereof wholly refused.' *Chicago, I. & L. Ry. Co.* v. *Southern Indiana Ry. Co.*, (Ind. App.) 70 N. E. 843."

Section 1305 of the Revised Laws of Oklahoma 1921, reads as follows:

> "No executor or administrator must directly or indirectly, purchase any property of

the estate he represents, nor must he be interested in any sale."

Section 1478 of the Revised Laws of Oklahoma 1921, reads as follows:

> "All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting and refusing an order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice of hearing and such application, making orders, rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts must be had and made as provided and required by the provisions of law concerning the estates of decedents unless otherwise specifically provided herein."

In *Allison* v. *Crummey,* 166 Pac. 691, the Supreme Court held, that section 1478 makes the law regulating sales by executors and administrators applicable to sales by guardians, and a guardian cannot directly or indirectly purchase any property of his wards, nor can he be interested in any sale thereof.

In the case of *Winsted* v. *Shank,* 173 Pac. 1041, the Supreme Court held that a guardian cannot directly or indirectly purchase any property belonging to his ward, nor can he be interested in any sale thereof.

In the body of the opinion it is said:

"In the case of *Burton* v. *Compton*, 150 Pac. 1080, it is held that where a guardian sells his ward's real estate to his wife, the deed is void regardless of the absence of fraud, or price, or the apparent irregularity of the proceeding. The statute (sections 6409 and 6566) prohibits the guardian from being interested in any sale of his ward's real estate."

In the case of *Burton* v. *Compton*, 150 Pac. 1080, it is said:

"And our statute (section 6409, Revised Laws 1910) says: 'No executor or administrator must directly or indirectly purchase any property of the estate he represents, nor must he be interested in any sale.' But the defendant (plaintiff in error) insists that this transaction was free from fraud, and that the price paid was adequate. That might all be true in this particular case, but the law looks beyond the circumstances of any individual case; for as said in *Frazier* v. *Jenkins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575: 'The opportunities which are open to an unlawful trustee to advantage himself out of the trust estate are so many and so tempting and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter.'

"And for this reason the legislature has fixed this statutory rule which removes both the temptation and opportunity to do wrong. And the courts can make no distinction in the application of the rule between the honest and the

dishonest. And whether that transaction be free from fraud or not, is immaterial to the issue in the case. It is a transaction prohibited by the statute and condemned by public policy."

The record here presents a case of the worst possible kind of fraud entered into by the guardian of the minor with the lessees. The guardian was bribed by the lessees to execute the lease. The trial court expressly found that the consideration for the lease was the fraudulent consideration received by the guardian. The lease therefore at its inception was impregnated with corruption, and the corruption participated in by both the guardian and the lessees continued to operate on their minds and control their conduct from the date of the lease on the 19th day of August, 1913, until the months of August and September, 1915, when the fraudulent arrangement was finally consummated and the guardian was paid by the lessees $3500.00 in money and a Saxon automobile. Such a lease is condemned by every principle of the common law and of equity as well as by the positive provisions of the Oklahoma statutes above mentioned as elucidated by the decisions cited. We invite special attention to the rule announced in those decisions, that such a lease is void even in the absence of fraud, because it is prohibited by the plain provisions of the statute.

SECOND PROPOSITION.

The fact that Dunn and Gillam, lessees, and A. N. Thomas, guardian, concealed from the county judge and County Court of LeFlore County the secret agreement by which A. N. Thomas, the guardian, D. Thomas, Earl McGowen and A. N. Funkhouser were to have an interest in the lease and in the stock of the Bull Head Oil Company, constituted fraud upon the court and rendered the approval of the lease, in so far as Dunn and Gillam are concerned, illegal and void; and the concealment of the personal and private interests of A. N. Thomas, D. Thomas, Earl McGowen and A. N. Funkhouser from Dana H. Kelsey, United States Indian Superintendent, and the Secretary of Interior, likewise constituted fraud on those officers and rendered the lease illegal and void.

We need but call the attention of the court to the following cases on this proposition to show that such concealment of fraud by the guardian and the lessees rendered the lease illegal and void:

Barnsdall v. *Owen*, 200 Fed. 519;
Mandler v. *Rains*, .. Okl. .., 174 Pac. 240;
Anicker v. *Gunsberg*, 226 Fed. 178.

It is apparent from the findings of fact by Judge WILLIAMS that he would have held the oil and gas lease void if it had not been for the defenses set up by Dunn and Gillam in which it was contended that A. N. Thomas was not the guardian of Allie Daney,

and that his appointment as guardian in 1911 by the County Court of LeFlore County, Oklahoma, was void, because in 1905 J. J. Eaves had been appointed by the United States Court for the Southern District of the Indian Territory curator of the estate of Allie Daney, and that he continued to be such curator after statehood, and that when he executed the lease on January 24, 1914, the fraud which had entered into the original procurement and execution of the lease by Thomas was in some way extracted; and it is also apparent that the Circuit Court of Appeals would have held the lease void by reason of the fraud which entered into its procurement and execution except for the fact that that court concluded that the estate of the minor was in no way injured by the fraud, and therefore it was not actionable.

THIRD PROPOSITION.

This proposition is set forth in the third assignment of error, and that is that the trial court erred in holding that the oil and gas lease executed by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam on the 19th day of August, 1913, was rendered valid and binding on the estate of the minor, Allie Daney, because J. J. Eaves, as curator of the estate of Allie Daney, attached his signature to the oil and gas lease and acknowledged the execution of the same before a notary public, and the

court erred in not holding that the lease was illegal and void as against the said T. H. Dunn and J. Robert Gillam and their wives, notwithstanding the fact that J. J. Eaves, as curator of the estate of Allie Daney, attached his signature to and acknowledged the execution of the lease.

The lease in controversy is set out in full at pages 16 to 22 of the transcript. It is in regular form and bears date of August 19, 1913. The name of A. N. Thomas, guardian of Allie Daney, appears therein as a party grantor, and no other name is contained in the lease as grantor. J. J. Eaves, the curator, in no way connects himself with the operative or granting terms of the lease. On the 26th day of January thereafter he annexed his signature to the lease by signing it "J. J. Eaves, Curator of Allie Daney" (Tr. 159), and on the same day he acknowledged it at Ardmore, Oklahoma, before F. M. Adams, notary public (Tr. 22 and Tr. 159). It appears at pages 234, 235 and 236 of transcript that on the 26th day of January, 1914, J. J. Eaves applied to the County Court of Love County, Oklahoma, for permission to execute an oil and gas lease on the land in controversy and on that date that court made an order reciting that it appearing to the court that on the 19th day of August, 1913, one A. N. Thomas as guardian of Allie Daney a minor, executed an oil and gas lease upon the lands described in the petition under orders of the County Court of LeFlore County,

which lease was approved by that court on the same day, to T. H. Dunn and J. Robert Gillam, and

> "It appearing further that the execution of another lease upon said lands to other persons would be detrimental to the interests of said minor;
>
> "*Now, therefore,* it is ordered by the court that J. J. Eaves, as curator of the estate of Allie Daney, join in said lease to T. H. Dunn and J. Robert Gillam, by the execution, in proper form, of the same oil and gas lease heretofore executed by said A. N. Thomas."

On the same day J. J. Eaves reported to the court that he had joined in the execution of the Thomas lease and the court on that day made an order approving the lease, which order is in words and figures as follows, to-wit:

> "Now, upon this 26 day of January, 1914, came on to be heard the report of J. J. Eaves, curator of the estate of Allie Daney, a minor, showing that upon the 26th day of January, 1914, said J. J. Eaves, as said curator, joined in the execution of an oil and gas mining lease, under forms prescribed by the Department of the Interior, dated August 19, 1913, to T. H. Dunn and J. Robert Gillam, upon the following described land, to-wit:
>
> S2 of NW4 of SW4 and W2 of SW4 of SW4 of section 4, township 4 south, range 3 west;
>
> and the court being fully advised in the premises, and believing it to be for the best interest of said minor;

> "*It is therefore,* ordered by the court that said oil and gas lease executed on the 19th day of August, 1913, by A. N. Thomas, guardian, to T. H. Dunn and J. Robert Gillam, and executed on the 26 day of January, 1914, by J. J. Eaves as curator of Allie Daney, be and the same is hereby, in all things approved and confirmed" (Tr. 235-236).

It thus appears that while the County Court of Love County might have intended for J. J. Eaves, curator, to execute the lease in due and proper form and thereby make it a binding lease so far as he as curator was concerned, he did not do so. His name does not appear in the body of the lease. He merely attached his signature to the lease below the names of the parties, A. N. Thomas as guardian, and T. H. Dunn and J. Robert Gillam as lessees, who had executed and acknowledged the lease on the preceding 19th day of August. He assumed no responsibility with respect to that lease. He in no way connected himself with any granting clause in the lease, and we submit that what he did, failed to give the lease any force or effect whatever so far as J. J. Eaves curator of the estate of Allie Daney was concerned. Nor can it be said that J. J. Eaves intended to execute a valid curator's lease, because on the 9th day of January, 1914, which was fifteen days before he attached his signature to the Thomas lease, it was agreed that he should resign as curator (Tr. 135). He never exercised any dominion or control over

the leased premises and never collected any of the royalty or bonus money. He was discharged as curator on the 12th day of September, 1924 (Tr. 239).

The Interior Department, through the Indian Superintendent, never recognized Eaves in connection with the lease in any way whatever.

On the trial it was stipulated that:

> "It is conceded by the defendants that after the compromise agreement under which the Bull Head Oil Company was organized and the lease from Thomas, guardian, to Dunn and Gillam was signed by Eaves, curator, Mullen requested that the lease executed by Eaves, curator, to him (Mullen, and shown by plaintiff's Exhibit 23) be disapproved, and that it was disapproved so far as the land in controversy is concerned, and that therefore Eaves as curator had nothing further to do with the oil and gas lease or the royalties collected therefrom, and that from and after the approval of the lease executed by A. N. Thomas, as guardian, and Eaves as curator, Thomas has been recognized as the guardian of Allie Daney in all matters connected with the operation of the lease" (Tr. 105-106).

All J. J. Eaves ever did in connection with this lease was to apply to the County Court of Love County for permission to execute it and procure from that court an order authorizing him to join in it after having attached his signature to it and acknowledged it.

The sole reliance of Dunn and Gillam and their wives is the contention that the lease acquired va-

lidity when *J. J. Eaves attached his signature to it as curator of the estate of Allie Daney.* It is now conceded by all parties to the action that the lease was void up to January 26, 1914, when J. J. Eaves signed and acknowledged it. Dunn and Gillam and their wives set up this act as their *sole defense to the action.* If Eaves had not signed it, the plaintiff would have been entitled to a decree for the land. If his signature to the lease does not bind the estate they have no defense to the action.

We submit that under the rule in Oklahoma, as well as under the general rule, the estate of the minor was in no way bound by the act of J. J. Eaves in affixing his name as curator to the blank paper.

In the case of *Lowery* v. *Westheimer*, 160 Pac. 496, the correct rule on this subject is announced.

In that case the court construed a deed which contained the following granting clause:

> "*Know all men by these presents:* That I, Thomas M. Lowery, Jr., joined by my wife, Florence Lowery, of Hewitt, Carter County, Oklahoma, for and in consideration of the sum of forty-one hundred, sixteen and no/100 dollars ($4,116.00), $350.00 of which is c a s h in hand paid, the receipt of which is hereby acknowledged, and the assuming of two mortgages, one for the amount of $2,700.00, one for the amount of $1,066.00, on the land hereinafter described, and in favor of the Oklahoma Farm Mortgage Co., of Oklahoma City, Okla.

"Do grant, bargain, sell and convey unto Max Westheimer and David Daube of Ardmore, Carter County, Oklahoma, the following described real property and premises situated in Carter County, Oklahoma, to-wit:" (then follows a description of 140 acres of the homestead allotment of Thomas M. Lowery, Jr., and 110 acres of her homestead allotment),

and held that the deed not only contains sufficient words to convey Florence Lowery's title to the land, but is in form sufficient to satisfy section 1143, Revised Laws of 1910, as indicating the consent of the husband to the sale of the land described in the deed, the same being a part of the homestead of the family.

It was contended that the deed did not contain operative words of grant so far as Florence Lowery was concerned, and that it did not convey a tract of land described in the deed which belonged to her and which constituted a part of the homestead of herself and family.

The court in that case said:

"There can be no doubt of the correctness of the rule laid down by Chief Justice TANEY, in *Agricultural Bank of Miss.* v. *Rice*, 4 How. 225, 11 L. ed 949, '* * * in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient,' assuming that the 110 acres described in

the deed—the allotted homestead of Florence Lowery—was also the homestead of the family, the deed not only contains apt words of grant on her part sufficient to convey her title to the land, but is in form sufficient to satisfy the statute as indicating the consent of the husband to the sale thereof as a part of the homestead of the family."

In *Agricultural Bank* v. *Rice, supra*, the Supreme Court construed a deed, the granting clause of which reads as follows:

"This indenture made the 14th day of September, in the year of our Lord one thousand eight hundred and thirty-five, between William M. Phipps in right of his wife Martha, William R. Haile in right of his wife Mary, and David H. Gibson in right of his wife Sarah, legal heirs and representatives of Adam Bower, deceased, of the County of Adams and State of Mississippi, of the one part, and Noah Barlow and Margaret, his wife, and Henry S. Holton and Theoda, his wife, of the same place, of the other part, *witnesseth:* That the said parties of the first part, for and in consideration of the sum of four thousand dollars, to them in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors and administrators, forever release therefrom, by these presents, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said parties of the second part, their heirs and assigns for-

ever, all that certain lot or parcel of ground situate in the City of Natchez."

The deed was signed as follows:

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, this day and year above written.

Wm. M. Phipps,
Martha Phipps,
William R. Haile,
Mary Haile,
David H. Gibson,
Sarah Gibson;"

and acknowledged as follows:

"Personally appeared before the undersigned, justice of the peace for said county, William M. Phipps and Martha, his wife, and William R. Haile and Mary Haile, his wife, and David H. Gibson and Sarah Gibson, his wife, and acknowledged that they signed, sealed and delivered the within deed on the day and year and for the purposes therein contained. And Martha Phipps, Sarah Gibson and Mary Haile, wives of William M. Phipps, William R. Haile and David H. Gibson, having been examined separate and apart from their husbands, and acknowledged that they signed, sealed, and delivered the same as their act and deed, free of fears, threats, or compulsion of their said husbands."

In construing this deed, the Supreme Court, speaking through Chief Justice TANEY, said:

"This deed, also is inoperative as to their

title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part—the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

"It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the statute of Mississippi. For assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became *sole*, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void."

This decision of the Supreme Court of the United States has been cited with approval throughout the United States, and with practical unanimity, the rule announced therein has been approved in the decisions of the various states.

In Ruling Case Law, under head of "Deeds," section 29 reads as follows:

> "On the question as to whether one who signs a conveyance is bound by it, although he does not appear in the body thereof to be a party to the instrument, there is some conflict of opinion; but the great weight of authority is in favor of the proposition that as to such person the deed is wholly inoperative. The theory of these cases is that apt words of conveyance must be shown in connection with the grantor's name in order to show an intent to convey, as distinguished from a mere assent to the act of some other grantor named; while the cases to the contrary are based on the theory that the whole instrument should be looked to and the evident intention carried out, without respect to the strict common law rules requiring the use of apt words in connection with the grantor's name."

In the footnote, under this section, many authorities are cited.

—*Stone* v. *Sledge*, 87 Tex. 49, 26 S. W. 1068;
Thompson v. *Johnson*, 58 S. W. 130.

In *LeBlanc* v. *Jackson*, 161 S. W. 60, it appears that a deed was drawn up naming a number of grantors, among them being Emerante Brousard. She died without signing the deed. It was subsequently signed and acknowledged by certain of her heirs who are not named in the body of the deed as grantors. The court held that the deed was not binding on the heirs, stating that:

> "The fact that Emerante Broussard is named as one of the grantors in the body of the deed, and that her interest is to be conveyed, she being dead, would not distinguish this case from the general doctrine, which is well settled in this state, that a deed is not binding on one who signs it but who is not named in the body of the deed as one of the grantors. *Stone* v. *Sledge*, 87 Texas 49, S. W. 1087, 49 Am. St. Rep. 65; *Thompson* v. *Johnson*, 24 Texas Civ. App. 250, 58 S. W. 1030. The rule is different in some of the states. *Sterling* v. *Park*, 58 S. E. 828, reported also in 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224, 12 Ann. Cas. 201. An extensive note to this report collates the authority showing that the weight of the authority is in favor of the rule stated in the Texas cases cited."

See, also, *Jackson* v. *Craigen*, 167 S. W. 1101.

In *Lowery* v. *Westheimer, supra,* the Supreme Court reiterated the rule that in deeds, the words, terms and provisions of deeds are construed more strongly against the grantors. The contrary rule applies in the construction of oil and gas leases.

In late edition of Thornton's work on The Law Relating to Oil and Gas, in section 219, it is said:

> "In discussing the right of a lessor to rent or royalties, it must be borne in mind that oil and gas leases are usually construed favorably, in this respect, to the lessor, if there be a doubt concerning the right to rent or royalty, and its amount. The general rule is undoubtedly that a deed is construed most strongly against the grantor and in favor of the grantee. But such

is not the case in an instance of an oil or gas lease; and the reason for this arises out of the well known transactions of oil and gas operators."

See, also:

Frank Oil Company v. *Belleview Gas Co.*, 119 Pac. 260;

Barnsdall Oil Company v. *Leahy*, 195 Fed. 731, and

Betman v. *Harness*, 42 W. Va. 433, 21 S. E. 271, 36 L. R. A. 566.

An oil and gas lease conveys such an interest in land, that it must be in writing in order to comply with the statute of fraud. A lessor must use some words expressing the intention to create a leasehold estate.

—Thornton on Oil and Gas, section 291;
Woodruff v. *Franklin*, 204 Pac. 452.

We submit therefore that the signature of J. J. Eaves, curator, to the Thomas lease in no way bound the estate of the minor, that it was a nullity, and that no rights can be predicated thereon in this case. Neither can the fact that Eaves attached his signature to the Thomas lease be used by defendants, Dunn and Gillam, as a means of extracting the fraud out of the lease.

This is one of the distinct grounds on which the lease is attacked after it was "joined in" by Eaves as curator. It is alleged that the attaching of his

signature to the lease executed by Thomas "was wholly without effect, illegal and void" (Tr. 10).

The Circuit Court of Appeals however without conceding that the failure of Eaves to join in the body of the lease and connect himself with operative words of grant, rendered the lease void, satisfied itself by the statement that the compromise settlement made by plaintiff through which it received $45,000.00 for the minor, had the effect of confirming the lease, and that if the plaintiff now has a right to continue the litigation against Dunn and Gillam that right is based upon their alleged fraudulent conduct and a claim for damages on account of fraud. Clearly the compromise with the defendants other than Dunn and Gillam did not have the effect of confirming the lease so far as Dunn and Gillam are concerned. We discuss the question as to whether the fraud was sufficient to justify action against Dunn and Gillam under another head. But we most emphatically insist that the compromise which was made cannot in any way inure to the benefit of Dunn and Gillam and relieve them of the consequences of their fraudulent conduct.

If the lease was not executed by Eaves so as to be binding as a curator's lease Dunn and Gillam have nothing to stand on in this case.

FOURTH PROPOSITION.

The fraud which entered into the execution and procurement of the oil and gas lease was never in any way condoned or taken out of the transaction. Dunn and Gillam, the lessees, and A. N. Thomas, the guardian of the minor, at all times carried in their minds the intention to commit the fraud, and as set forth in the fourth assignment of error, the fraudulent agreement was consummated in the months of August and September, 1915, when the lessees paid the guardian, for his personal and private use, $3,500.00 in money, and delivered to him a Saxon automobile.

It will be noted on page 65 of transcript, in his original findings of fact, the trial court concluded that when J. J. Eaves attached his signature to the void lease "this had the effect of putting the oil and gas legal title in the Bull Head Oil Company *free from the legal effect of fraud in the execution of the lease by A. N. Thomas, as guardian.*" He also held that although from a fair preponderance of the evidence, there was legal fraud in the execution of the original lease by A. N. Thomas as guardian to Dunn and Gillam, yet that since J. J. Eaves was the legal guardian of the estate of the minor and he joined in the Thomas lease that carried the oil and gas title, when it was authorized by the County Court of Love County and "*afterwards approved by that court, and then afterwards approved by the Secre-*

*tary of Interior * * * that that had the effect of placing the oil and gas title in the Bull Head Oil Company free from fraud."*

Then again, as a part of the decree the trial court found, as appears on page 77 of the transcript, that when J. J. Eaves, curator of the estate of Allie Daney, subscribed his name to the lease previously executed by A. N. Thomas to Dunn and Gillam, it being the intention that Eaves should so execute the lease as to make it a valid oil and gas lease when approved by the county judge of Love County and by the Secretary of the Interior, that it was to be rendered "free from fraud." Certainly no intention to "free the transaction from fraud" can be attributed to Dunn and Gillam. Nor, can it be said that A. N. Thomas ever intended that the transaction should be an honest one. So far as Eaves personally was concerned he might have intended to execute a valid lease. He knew nothing about the fraudulent arrangement being carried on by Dunn and Gillam and A. N. Thomas. They concealed the fraud in the transaction from Eaves just as they concealed it from the County Court and county judge of LeFlore County, the County Court and county judge of Love County, the Indian Superintendent Kelsey and the Secretary of the Interior. At the time Eaves attached his signature to the Thomas lease it was the understanding that the lease which Eaves had executed in favor of Mullen should be abandoned by Mullen

and disapproved and rejected by the Secretary of the Interior (Tr. 105-106). Eaves was to resign as curator of the estate. On the 12th day of September, 1914, Eaves was discharged as curator (Tr. 239). It was then the understanding that Thomas was to be reappointed guardian of Allie Daney, and pursuant to this understanding he was reappointed by the County Court of LeFlore County September 30, 1914 (Tr. 226-227). While these events were taking place, Dunn still held in his name, for the use and benefit of A. N. Thomas 2000 shares of the capital stock of the Bull Head Oil Company of the value of $2000.00.

On October 23, 1914, just after Eaves had resigned as curator of the estate, and A. N. Thomas had been reappointed, he wrote T. H. Dunn, among other things, as follows:

"Dear Friend:

I have been thinking for some time of writing you regarding our matter, and have come to the conclusion that it is time that our matter was fully settled. I know that you and Mr. Gillam are wanting to hold the matter, so I want you to either purchase or sell same for me. * * * I do not want same disposed of until I get the price that same is worth. So please make arrangements for me and write me when you are ready, and I will come over and bring the matter with me" (Tr. 83).

T. H. Dunn replied to this letter on the 3rd of November, 1914, in which, among other things, Dunn said:

> "Atha, you ought to realize that the matter you referred to is one that requires a personal interview, and I will make an effort to visit you before the first of the year" (Tr. 84).

This correspondence certainly does not evidence an abandonment of the fraud in the procurement and execution of the lease. The lessor was demanding a settlement. He was trying to collect the bribe money. The lessee T. H. Dunn explained "that the matter you refer to is one that requires a personal interview."

On March 21, 1915, while Dunn still had 2000 shares of the Bull Head Oil Company's stock in his name as trustee, which he was holding for A. N. Thomas, he wrote Thomas the following characteristic letter, beating down the price of the stock:

> "There is not a thing of interest that I can write you, I only wish I could and that is why I have had nothing to say. The oil field is dead as a door nail, we have only run one tank of oil this year so far and if I could see one bright spot ahead I would say so. Most of the companies are having to make assessments to meet their obligations and expenses. I have been terribly embarrassed owing to the position I have held with the different companies that I am interested, none of whom have money to pay expenses with and so long as they can make no sales it cannot improve."

In the early summer of 1915 negotiations for the sale by A. N. Thomas to Dunn and Gillam of his in-

terest in the stock of the Bull Head Oil Company were begun, and resulted in an agreement to sell the 2000 shares of the stock in the company then held in Dunn's name as trustee for $1500.00 cash and for a farm. A sham escrow agreement was entered into in the name of J. J. Thomas, father of A. N. Thomas, with P. C. Dings, the effect of which was to provide that J. J. Thomas was to surrender the 2000 shares of stock to Dunn and Gillam in consideration of Dings' agreement to convey to J. J. Thomas a 200 acre tract of land near Ardmore, Oklahoma. Dunn and Gillam deeded the land to Dings and then Dings deeded it to J. J. Thomas with the understanding that a loan was to be procured on the land, and the proceeds of the loan paid to A. N. Thomas (Tr. 84-86). This arrangement was carried out, but it was the plainest kind of sham and subterfuge to keep A. N. Thomas' name from appearing on the surface. Judge WILLIAMS held in substance that this transaction was a sham and a fraud, and on page 68 of transcript he finds that T. H. Dunn and J. Robert Gillam acquired the interest held in the name of J. J. Thomas, the transaction being negotiated and concluded with A. N. Thomas. When this transaction occurred on July 20, 1915, Dunn and Gillam and A. N. Thomas were still carrying out the fraudulent agreement. They continued to commit the fraud until the following August and September, when the loan was completed and A. N. Thomas was paid the $3500.00 and given a Saxon automobile. With re-

spect to this transaction, the trial court expressly finds:

> "That T. H. Dunn held in his name as trustee shares of stock in the Bull Head Oil Company of the par value of two thousand ($2,000.00) dollars, for the personal and private benefit of A. N. Thomas from the time the original stock of said company was issued until sometime in the year 1915, at which time he and J. Robert Gillam purchased the same from A. N. Thomas and paid him therefor the sum of three thousand five hundred ($3500.00) dollars in money and a Saxon automobile." (Tr. 76.)

This was done pursuant to the corrupt agreement which had been in the minds of A. N. Thomas, the guardian, and T. H. Dunn and J. Robert Gillam, the lessees, from the inception of the transaction. That agreement was never out of their minds.

The evidence overwhelmingly shows that they were committing a fraud upon the estate of the minor at every step they took from August 19, 1913, to September, 1915, when the money was paid and the automobile delivered.

The legal conclusion of the trial judge that the signing of the Thomas lease by J. J. Eaves as curator on January 26, 1914, rendered the lease *free from fraud*, is in irreconcilable conflict with the facts. The fraud in this case is essentially one of fact, overwhelmingly proved on the trial, found to exist by the trial court and by the Circuit Court of Appeals. It is immaterial so far as the question of fraud was

concerned, whether A. N. Thomas was the rightful guardian of the minor's estate or not. In every way possible Dunn and Gillam recognized him as the guardian of the estate. They accepted the lease from him as guardian, agreed to pay royalty to him as guardian, transferred the lease to the Bull Head Oil Company, and accepted the benefits from the lease to the extent of thousands of dollars. Under every principle of law and equity they are estopped from denying the validity of the lease executed by A. N. Thomas, as guardian of the Allie Daney estate.

Section 5247, Compiled Statutes Oklahoma, 1921, has been in force ever since statehood. That section reads as follows:

> "Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

That section was construed by the Oklahoma Supreme Court in *Avey* v. *Van Voorhis,* 140 Pac. 615, where it was held according to the second section of the syllabus:

> "The son who, with full knowledge of all

> the facts, accepts his part of the proceeds of the sale of his father's real estate, sold and conveyed by an attorney in fact after the death of his father, and who retains the proceeds 11 years before commencing action to establish his claim to the property as an heir of his father, is, under section 1150, Rev. Laws, 1910 (which is the same as section 5247, Compiled Statutes, 1921), estopped from asserting such claim, and from declaring the invalidity of the deed executed by the attorney in fact."

See *Anchor Steam Bottling Works* v. *Baumle*, 155 Pac. 518.

From August, 1913, to January, 1914, Dunn and Gillam contended before the Indian Superintendent that Thomas was the rightful guardian of Allie Daney, that the lease executed by him was in all respects legal and ought to be approved. They employed counsel who filed before the Indian Superintendent an elaborate brief in support of the legality of the appointment of Thomas as guardian and urged the approval of the lease executed by him. They charged that Eaves was not the legal guardian of the estate of Allie Daney and that he was a professional curator for Mullen, appointed at the instance of Mullen in order that Mullen may exploit the lands of Allie Daney to her detriment, and that the pretended authority of Eaves as curator of Allie Daney was in fraud of her rights and in defiance of the laws controlling guardians and their wards in Oklahoma (Tr. 199-205).

Under the statutory rule in Oklahoma, Dunn and Gillam were irrevocably bound up with the A. N. Thomas lease, and clearly estopped from denying the authority by which he executed it, or from avoiding any of the consequences of this fraudulent conduct in the procurement of the lease. We submit therefore that the trial court erred in his legal conclusion that J. J. Eaves by attaching his name to the Thomas lease and joining therein, rendered it free from fraud.

The Thomas lease, joined in by Eaves, was offered in evidence by the defendants as a muniment of their title. If it is subject to the criticisms here offered, it failed to show they had any interest in the leased premises. Hence it was not necessary for the plaintiff to anticipate its introduction. It was offered by the defendants in defense of the plaintiff's cause of action. It stands in the record for what it is worth. If it shows title to the oil and gas lease in defendants it should have been admitted and given that effect. If it is void for the reasons here pointed out, then it is no defense to the plaintiff's cause of action.

Fifth Proposition.

The United States Circuit Court of Appeals erred in holding that the lease in controversy was executed for a full and adequate consideration, and in holding that the estate of Allie Daney, the ward of the Gov-

ernment for whom this suit is being prosecuted, was not damaged or injured by reason of the fraud perpetrated by Dunn and Gillam in procuring the lease, and in not holding that the lease at the time it was joined in by J. J. Eaves on the 26th day of January, 1914, had a rental value of from four to six hundred dollars an acre, and an aggregate lease value of from sixteen to twenty-four thousand dollars, as set forth in the thirteenth and sixteenth assignments of error, to which reference is hereby made; and the court erred in holding that the fraud committed in procuring the lease is not actionable.

The Circuit Court of Appeals at page 263 of transcript says there is no testimony in the record which supports a conclusion that the Thomas lease was made for an inadequate consideration and that it did not provide a fair and reasonable return to the ward. The court then states that it is an established principle that fraud without damage is not actionable, either at law or in equity, and "that the facts in this case do not show that the minor sustained any damage on account of the fraudulent conduct charged against Dunn and Gillam."

If, as held by the trial court, the Thomas lease was void until joined in by Eaves the curator, then this transaction, so far as the making of the lease is concerned, must be treated as having begun on the 26th day of January, 1914, when Eaves joined in the lease. At that time the uncontradicted evidence

shows that the lease had rental value of four to six hundred dollars per acre, or of the aggregate rental value of from sixteen to twenty-four thousand dollars.

At page 160 of transcript Frank Adams testified as follows:

> "I was familiar with the value of the oil and gas leases in the vicinity of this land on January 9, 1914; this lease had a market value of from four to five hunded dollars per acre."

On pages 161 and 162 of transcript it appears that J. S. Mullen testified as follows:

> "I know what the departmental lease on the Allie Daney land was worth the latter part of January, 1914; it was worth about the capital stock of the company, that is, about eighteen thousand dollars."

On page 164 of transcript it appears that Erret Dunlap testified as follows:

> "I think I know what the market value of the Allie Daney lease was on January 28, 1914, and I would say five hundred dollars an acre would be a fair market value for it at that time."

On page 158 of transcript it appears that P. C. Dings testified as follows:

> "I have been engaged in the oil business in the Healdton field and am familiar with the value of leases in that field; I am familiar with its value in January, 1914, and would say that it

was worth four or five hundred dollars an acre at that time."

Evidently the Circuit Court of Appeals did not read the testimony of these witnesses. There is absolutely nothing in the record to contradict their testimony. That court therefore was in error in the statement that the $2000.00 bonus exacted by the Indian Superintendent was an adequate consideration for the lease. The Indian Superintendent could have obtained a much larger bonus if he had not been so insistent upon having the compromise which he had proposed carried into effect. If he had recommended the rejection of both leases and required the guardian or the curator to offer a lease on the local market at Ardmore on January 26, 1914, he could have obtained a bonus from sixteen thousand to twenty-four thousand dollars. It is undisputed that the lease value of the land for oil and gas purposes was rapidly increasing along about that time. We invite special attention to the report of O. U. Bradley, United States Oil Inspector, made to Kelsey, Indian Superintendent, as of date December 22, 1913. After reciting in detail the conditions prevailing on August 19, 1913, the date of the lease, he states:

"The discovery well made several flows and all indications at that time were such as to lead one to conclude that at a very conservative estimate it had a capacity of 100 barrels daily, and although at the time this lease was executed the

real capacity of the well was not ascertainable, the conditions surrounding this discovery and subsequent work thereon were extremely promising for a splendid producer, so that the lease executed upon the date mentioned above would undoubtedly command a substantial sum as a bonus consideration. In view of these facts, I am of the opinion the lease was worth $100.00 per acre, or $4000.00 upon the date of its execution and I so recommend'' (Tr. 206-7).

This report is an official document and ought to have great weight in determining the lease value of the land on the 19th day of August, 1913, when the original lease was executed. The bonus then agreed upon was $70.00 (Tr. 131). It is also probable that the Circuit Court of Appeals overlooked the fact that this report of the United States oil inspector was approved by the Indian Superintendent in a letter dated January 9, 1914, and addressed to Dunn and Gillam at Ardmore, Oklahoma, in which he says:

> ''Referring to oil and gas lease on 40 acres of the Allie Daney land heretofore in controversy between yourselves and Mullen, I respectfully beg to enclose herewith copy of report of United States oil inspector wherein he fixes the bonus value of the land at the time your lease was taken (August 19, 1913), at $100.00 an acre or $4000.00 for the lease. Please forward draft to cover same when the papers in connection with the lease are submitted'' (Tr. 192).

Clearly if the Circuit Court of Appeals had considered the official action of the United States oil

inspector in appraising the lease value of the land in August, 1913, at $4000.00 and the approval of that appraisement by Kelsey the Indian Superintendent, it would not have held that a bonus of $2000.00 was an adequate bonus on January 26, 1914, after the lease value had rapidly increased until, according to the uncontradicted testimony of the witnesses Dings, Dunlap, Adams and Mullen above quoted, it had a lease value at that time of from sixteen to twenty-four thousand dollars.

During the scramble over the lease and the negotiations which resulted in a compromise between the Dunn and Gillam and the Mullen factions, nobody seemed to be very much interested in the minor. The Indian Superintendent recommended the approval of the lease with a bonus of $2000.00, the value of the bonus being fixed as of August, 1913. He had before him the official appraisement of the bonus value of the lease as of that date at $4000.00. He approved that appraisement and demanded the payment thereof by Dunn and Gillam. He waived the payment of the $4000.00 and substituted for it a bonus of $2000.00. The guardian, Thomas, was not looking after the interest of the minor while these events were occurring, because Dunn and Gillam had bribed him to give them the lease on payment of a bonus of $70.00 and he was actively engaged in earning the bribe money, which was subsequently paid him. Of course Dunn and Gillam were not look-

ing out after the interest of the minor. These circumstances evidently escaped the attention of the court, and we feel sure that the testimony of the other witnesses above mentioned showing that the property had a lease value of from sixteen to twenty-four thousand dollars on January 26, 1914, also escaped the attention of that court. It is impossible to reconcile any consideration of this evidence and these circumstances with the statement in the opinion of the Circuit Court of Appeals that there is no testimony in the record which supports a conclusion that the Thomas lease was made for an inadequate consideration, and, for that reason, the fraud perpetrated by Dunn and Gillam was not actionable.

No doubt that in the course of time the minor's land would have been subject to some drainage, but that is a matter of speculation. Oil wells have been in operation on this tract of land for nearly eleven years, and they are still producing oil. There is no evidence in the record that drainage would have started on this land before a new lease could have been executed and operations begun under it. The Circuit Court of Appeals refers to the fact that in the settlement with the defendants other than Dunn and Gillam and their wives, $45,000.00 was acquired for the benefit of the minor, as a circumstance to show that she has done reasonably well with this lease. Reference is also made to the fact that at the time of the trial of the case in April, 1920, the mi-

nor had received $72,515.00 in royalties. We submit that these matters should not be considered in determining whether an adequate bonus was procured for the lease in January, 1914. While the minor was getting the $72,515.00 royalty, the lessees were getting more than a half million dollars in money and by this time they have probably made more than a million out of the oil and gas produced from this lease. The court must look to the conditions prevailing at the time the lease was executed. From the uncontradicted testimony it appears that the lease had a bonus value of from sixteen to twenty-four thousand dollars on the 26th day of January, 1914, when, according to the contentions of both plaintiff and defendant, the lease in controversy first acquired its validity, if it ever was valid.

We submit therefore that the fraud which entered into the procurement and execution of the lease and remained therein from its inception until August and September, 1915, controlling the conduct of the guardian lessor and the lessees, Dunn and Gillam, during all that time is actionable, and that the authorities cited by the Circuit Court of Appeals to support its conclusion that the fraud committed by Dunn and Gillam is not actionable, are wholly inapplicable to the facts in this case.

To sustain the position that the fraud which entered into the procurement and execution of the lease in controversy is not actionable, the Circuit

Court of Appeals cited the case of *Ming* v. *Woolfolk*, 116 U. S. 599, 29 L. ed. 740, which was an action to recover damages for deceit and it was held that the plaintiff could not recover damages in such an action where it appears that the defendant by false representations induced the plaintiff to do something which he would have done anyhow and by which he sustained no loss. That case certainly is not applicable here.

The Circuit Court of Appeals also cites the case of *Marshall* v. *Hubbard*, 117 U. S. 415, 29 L. ed. 999, where it was held that, giving the defendant the benefit of every inference that could have fairly been drawn from the evidence, it was insufficient to authorize a verdict in his favor, a peremptory instruction for the plaintiff was proper. There is not a syllable in that case relating to sufficiency of fraud to sustain a cause of action. It is an ordinary action based on fraudulent representations where the testimony was so overwhelming against the defendant that the court held an instruction in favor of the plaintiff was justified. The case does not in any particular support the position to which it is cited by the Circuit Court of Appeals.

The case of *Smith* v. *Bowles*, 132 U. S. 125, 33 L. ed. 279, is also cited by the Circuit Court of Appeals to support the position that the fraud committed by Dunn and Gillam is not actionable. Unfortunately this case also contains nothing on the

subject of the sufficiency of fraud to sustain a cause of action. The case was reversed, not because the fraud proven caused no detriment and therefore was not actionable, but solely because the trial court in its charge to the jury adopted the wrong measure of damage.

The case of *Sigafus* v. *Porter*, 170 U. S. 116, 45 Law. edition 113, did not turn on the question as to whether or not the fraud alleged and proved had caused no damage and was therefore not actionable; but the decision related entirely to an erroneous instruction on the measure of damages, and was reversed because an erroneous rule on that subject had been given by the trial court in its instructions to the jury.

The court also cites the case of *Clark* v. *White*, 12 Peters 178, and quotes a paragraph from the syllabus to the effect that in equity as in law the injury and fraud must concur to furnish ground for judicial action. A mere fraudulent intent unaccompanied by any injurious act is not subject to judicial cognizance. The facts of that case bear no resemblance whatever to the facts in the instant case, and the mere quotation in the opinion of that principle is not enlightening. The court might have improved the quotation if it had quoted the entire paragraph. The fraud in the case at bar is not in any sense abstract—it is direct and positive—corrupt if you please, and falls clearly within the principle an-

nounced in the part of the paragraph quoted from which was omitted by the Circuit Court of Appeals, and is as follows:

> "Fraud ought not to be conceived; it must be proved and expressly found."

Both of these requirements have been met in the ase at bar. The fraud has been proved and the trial ourt has found it to exist.

The Circuit Court of Appeals also quotes an abtract principle from the case of *Garrow* v. *Davis*, 15 low. 273, 14 L. ed. 692, but that case went off beuse the charges of fraud in the bill were denied in e answers and the evidence was insufficient to susin the allegations.

The Circuit Court of Appeals also cites a numer of cases in the Federal Reporter, and a number sections from Story's Equity Jurisprudence, Pomoy's Equity Jurisprudence and Bispham's Rules Equity. But they merely sustain the abstract prinple that to be actionable, fraud must be proven and own to have caused injury.

In this case the plaintiff did both. It established allegations of fraud by overwhelming proof, and showed that the fraudulent conduct of the defendts Dunn and Gillam was the cause of the execun of an oil and gas lease on the estate of the mir, Allie Daney, upon a wholly inadequate bonus sideration.

Another case cited by the Circuit Court of Appeals is *Angle* v. *Railway Company*, 151 U. S. 1, 38 L. ed. 1, but we most respectfully state that it contains no relief whatever for the defendants in this case, and no support for the decision of the Circuit Court of Appeals. That opinion is one of the great landmarks of American jurisprudence and illustrates the adequacy of the powers of the courts to discover fraud and punish the violation of rights. We cite that case on another proposition in this brief and rely upon it with great confidence.

In order for fraud to be actionable it is not necessary that any particular amount of pecuniary loss be sustained. It is sufficient if fraud actually exists, and any amount of financial injury results therefrom. The rule on this subject is correctly stated in Sec. 898, Vol. 2, 14th Edition of Pomeroy's Equity Jurisprudence, as follows:

> "Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral. *If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party mislead has been very slightly prejudiced, if the amount is at all appreciable.*"

See, also:

Spreckles v. *Gorrill*, 92 Pac. 1011;

Wainscott v. *Occidental Association*, 98 Cal. 257, 33 Pac. 88.

See, also, 26 Corpus Juris, page 1171, where the rule is stated as follows:

> "While the general rule may be otherwise with respect to actions for rescission, where the action is one for deceit the damage or injury necessary to make out a cause of action in favor of plaintiff must to some extent, at least, be pecuniary or substantial, as distinguished from mere injury to feelings, in order to warrant a recovery. A right of action accrues, for example, where a person has been induced to enter into a contract by means of fraudulent representations, as for the purchase or sale of real or personal property or for the exchange of property; and recovery in deceit has been allowed for fraud causing the loss of an inchoate right of dower. In any event the damage, it has been held, need not be accurately measurable in money, it being sufficient if there is an injury to some property right, as distinguished from mere injury to feelings."

In Oklahoma the statute prohibits a guardian from acquiring an interest in his ward's property when sold by him, regardless of the absence of fraud or the adequacy of the price paid.

—*Burton* v. *Compton*, 150 Pac. 1080;
Winsted v. *Shank*, 173 Pac. 104;
Allison v. *Crummy*, 166 Pac. 691.

Section 1305 of Compiled Statutes Oklahoma, 1921, prohibits an executor or administrator from

directly or indirectly purchasing any of the property of the estate he represents, and prohibits him from being interested in any sale thereof.

Section 1478 of Compiled Statutes 1921, makes section 1305 applicable to sales by guardians of the property of their wards and prohibits them from being interested in any sale of the same.

The case of *Chastain* v. *Pender*, 152 Pac. 833, involved the purchase of real estate by the wife of the administrator at the administrator's sale. After the sale was approved by the County Court having probate jurisdiction, the wife, who was one of the heirs to the estate, brought suit against the other heirs to recover the title to the property. The heirs defended upon the ground that the statute prohibited the wife from purchasing at the administrator's sale, because her purchase inured indirectly to the benefit of the husband who was administrator of the estate. The court held that the sale was void even in the absence of actual fraud, and notwithstanding the fact that an adequate price was paid. Speaking on this point, the court said:

> "As to the first proposition presented, whether the husband administrator can sell the estate of his wife, we need look no further than the well considered opinion of *Burton* v. *Compton*, 150 Pac. 1080, where we find this question answered in the negative. We quote therefrom: 'The first proposition is before this court for the first time. Yet it is an old question, and has been passed upon repeatedly. And as far

as we know, Indiana stands alone in upholding such deeds. In 1781, long before there was any statute upon the subject, Lord Chancellor Thurlow of England, in *Fox* v. *Mackreth,* 2 Leading Cases in Equity (White and Tudor) 722, held: "That trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove." And he says, in substance, that the rule rests upon public policy, and such a purchase will not be permitted in any case, however honest the circumstances, for the general interest of public justice requires it to be destroyed in every instance, and that: "From general policy and not from any peculiar imputation of fraud, a trustee shall remain a trustee to all intents and purposes". And our statute (section 6409, Revised Laws 1910) says: "No executor or administrator must directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale". But the defendant (plaintiff in error) insists that this transaction was free from fraud, and that the price paid was adequate. That might all be true in this particular case, but the law looks beyond the circumstances of any individual case; for, as said in *Frazier* v. *Jeakins,* 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575: "The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting, and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out

of which it is possible for the former to make gain at the expense of the latter". And for this reason the Legislature has fixed this statutory rule which removes both the temptation and opportunity to do wrong. And the courts can make no distinction in the application of the rule between the honest and the dishonest. And whether the transaction be free from fraud or not is immaterial to the issue in the case. It is a transaction prohibited by the statute and condemned by public policy. * * * Besides, as well said in *Tyler* v. *Sanborn,* 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97: "There is, moreover, apart from this pecuniary interest, an intimacy of relation and affection between husband and wife and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction. He may, by reason of his great integrity, be just in such a transaction, but, unless his marital relations be perverted, he cannot feel disinterested; and it is precisely because of this feeling of interest that the law forbids that he shall act for himself in a transaction with his principal. It is believed to be within general observation and experience that he who will violate a trust for his own pecuniary profit will not hesitate to do it, under like circumstances, for the pecuniary profit of his wife". And for that reason the law forbids a trustee to put himself in a position where either his integrity may be questioned or his inclination to dishonesty may be indulged'."

In the case of *Vaughan* v. *Vaughan*, 162 Pac. 1131, it appears that there was an agreement among certain creditors of an estate in process of administration by which an administrator purchased all the property of the estate represented by him, and instead of satisfying an outstanding mortgage on the property, permitted the mortgage to be foreclosed and from the money derived from the estate purchased it at foreclosure sale. In a suit by the heirs against the administrator, it was held that the District Courts of Oklahoma had jurisdiction to declare a trust in the property purchased and held in the name of the administrator in favor of the heirs. After quoting the statute above referred to prohibiting an administrator from directly or indirectly purchasing the property of the estate he represents, or from being interested in the sale thereof, the court approved the rule laid down in *Allison* v. *Crummey, supra,* and *Chastain* v. *Pender, supra,* and also quoted from the case of *Imboden* v. *Hunter,* 23 Ark. 622, 79 Am. Dec. 116, as follows:

> "It is a stern rule of equity that a trustee to sell for others is not allowed to purchase, either directly or indirectly, for his own benefit, at the sale. He cannot be both vendor and purchaser. As vendor, it is his duty to sell the property for the highest price, and as purchaser it is his interest to get it for the lowest, and these relations are so essentially repugnant, so liable to excite a conflict between self-interest and integrity, that the law positively forbids

> that they shall be united in the same person. And it matters not, in the application of the rule that the sale was bona fide, and for a fair price. The inquiry is not whether there was fraud in fact. In such a case, the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que* trust, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party, itself, works his disability to purchase. * * * The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation of trust or confidence with reference to the subject of the purchase. It embraces all that come within its principle, permitting no one to purchase property and hold it for his own benefit, where he has a duty to perform, in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use."

These authorities do nothing more however than reiterate the general rule on the subject. In the case at bar the faithless guardian and his lessees Dunn and Gillam, in violation of the express provisions of the statute, entered into a fraudulent oil and gas lease by which they agreed that the guardian should have for his personal and private use an undivided one-fourth interest in the lease. That interest was later reduced to a one-eighth interest in the lease

and finally, in pursuance to the original fraudulent agreement, the interest of the guardian took the form of stock in the oil company and was afterwards purchased from the guardian by the lessees for $3,-500.00 and a Saxon automobile. The transaction was prohibited by statute. Clearly the United States, by virtue of its duty as *in loco parentis* of the minor, could maintain an action to set the lease aside. Dunn and Gillam having assigned the lease to an innocent purchaser for value, clearly are liable in this action brought by the United States for all the profits which they made out of the transaction. Gillam sold his stock in the oil company to Jake Hamon for $75,-000.00 (Tr. 168). He had previously collected, after having refunded to him all advancements made to the company, a dividend of five hundred per cent on the stock he owned in the company. Dunn and Gillam are joint *tort feasors*, and therefore both of them are liable for the profits made out of the transaction by either of them. Dunn had about the same amount of stock as Gillam and is directly liable in an accounting to about the same extent as is Gillam.

Under the decision of the United States District Court and the Circuit Court of Appeals, these two fraudulent lessees, joint *tort feasors* in the commission of the fraud, have been permitted to go unwhipped of justice and to carry off the profits made by them to the extent of more than two hundred thousand dollars.

We respectfully submit that the decision of each of the courts is wrong and that the case should be reversed, and Dunn and Gillam and their wives held to a full accounting.

Sixth Proposition.

The eleventh assignment of error is to the effect that the Circuit Court of Appeals erred in considering the recitals in the motion of T. H. Dunn and wife and J. Robert Gillam and wife to dismiss the appeal in determining the merits of the case, for the reason that the motion to dismiss the appeal constituted no part of the record proper on appeal.

Sometime after the case was filed in the Circuit Court of Appeals T. H. Dunn and wife and J. Robert Gillam and wife, filed a motion to dismiss the appeal (Tr. 253-258). The motion was overruled, but it contains certain recitals with reference to a compromise between the plaintiff and certain defendants. These recitals show that in consideration of an agreement not to seek a reversal of the case as against the Bull Head Oil Company and certain stockholders, that company agreed to pay the minor the proceeds of seven-sixteenths of the oil runs from the lease until the sum of $45,000.00 was paid. This compromise was made in the months of August and September, 1921, after the trial of the case on the merits in the court below had been concluded on June 7, 1920. While it was entirely proper to con-

sider all the recitals of fact in the motion in determining whether the appeal should be dismissed, we submit that citation of authorities is unneecssary to show that the Circuit Court of Appeals should not have taken into consideration the recital of the payment of this $45,000.00 in determining the merits of the case, and that the payment of this sum of money on a compromise long after the trial of the case had been concluded should not be urged as an argument to show that a sufficient bonus was obtained for the lease in 1914.

Seventh Proposition.

The sixth, seventh, eighth, ninth and thirteenth assignments of error may be considered together, and they complain of the action of the trial court and the United States Circuit Cou t of Appeals in not rendering judgment against the defendants, T. H. Dunn and his wife and J. Robert Gillam and his wife, for all moneys received by each, or any of them, from the proceeds of the oil and gas derived from the premises covered by the oil and gas lease in controversy, or from the stock of the Bull Head Oil Company.

Dunn and Gillam, having procured from the guardian of Allie Daney the lease in controversy by fraud, they became trustees for her use and benefit, and a court of equity must treat her as at all times the beneficial owner of the oil and gas rights and

the proceeds of the oil and gas taken from the premises covered by the lease. The Bull Head Oil Company and the stockholders of that company having been shown to be bona fide purchasers for value of the lease conveying the oil and gas rights and of the stock in the Bull Head Oil Company, a court of equity in holding Dunn and Gillam to an accounting should render a decree for the value of the lease at the time of trial, including the proceeds of the oil and gas taken from the lease.

When a fraudulent sale of a ward's property is made by his guardian, courts of equity disregard the form of the transaction and treat the ward as being at all times the beneficial owner of the property.

In the course of a discussion of the equitable maxim that equity regards and treats that as done, which in good conscience ought to be done, at the end of section 369, volume 1 of Pomeroy's Equity Jurisprudence, it is said:

> "Finally, in trusts arising by operation of law, implied, constructive, and resulting trusts, the equity subsisting between the *cestui que* trust and the holder of the legal title, and the obligation resting upon the latter, are treated as though worked out, by regarding the beneficiary as vested with an equitable but no less real ownership."

Thus, in the consideration of this case, the court must treat as having been done by Dunn and Gillam that which in good conscience ought to have been

done. That is, that they ought to have immediately surrendered and released the oil and gas lease; and their failure to do so, will in a court of equity not deprive the ward or the plaintiff of the beneficial ownership of the lease, and the proceeds of the oil produced under the operation of the lease.

—*Heinrich* v. *Heinrich*, 84 Pac. 326.

This principle, that is, that the court must treat the lease and all the oil and proceeds of the oil arising therefrom, as at all times the property of the ward, is further illustrated and emphasized in section 1053, volume 3, Pomeroy's Equity Jurisprudence, under head of "Trusts *Ex Maleficio*." where it is said:

> "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a

> higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer. Where these instances are so many and various, there are certain special forms of frequent occurrence and great importance which require particular mention."

This section of Pomeroy was quoted with approval by this court in the great case of *Angle* v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. ed. page 1.

The court also quotes Sec. 155 of Pomeroy's Equity Jurisprudence as follows:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

With regard to the remedy of the *cestui que* trust against the wrongdoer, in section 1058, volume 3, Pomeroy's Equity Jurisprudence, it is said:

"The essential nature of constructive trusts has been explained in a former paragraph, Equity regards the *cestui que* trust, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. Numerous important questions concerning the conduct of trustees, their relations with the trust property and with the beneficiaries, which arise from express trusts, can have no existence in connection with constructive trusts. Every act of the trustee in holding, managing, investing or otherwise dealing with the trust property as though he could retain it, is itself a violation of his paramount obligation to the beneficiary. If the trustee refuses or delays to convey the property to its beneficial owner, and retains it, derives benefit from its use, and appropriates its rents, profits, and income he must account for all that he thus receives, and pay over the amount found to be due to the *cestui que* trust, as well as convey to him the *corpus* of the trust fund. The beneficiary, therefore, being the true owner, may always, by means of an equitable suit, compel the trustee to convey or assign the *corpus* of the trust property, and to account for and pay over the rents, profits, issues and income which he has actually received, or, in general, which he might with the exercise of reasonable care and diligence have received. In such a suit the plaintiff is also entitled to any additional or auxiliary remedy, such as injunction, cancellation, accounting, which may be necessary to render his final relief fully efficient. No change in the

form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a bona fide purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrongdoing trustee. The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence."

—*Arnold* v. *Smith*, 140 N. W. 749;

Johnson v. *McKenna*, 78 Atl. 19.

Speaking of the remedies of the *cestui que* trust against a trustee who has violated his trust, the Court of Civil Appeals of Texas, in the case of *Sullivan* v. *Ramsey*, 155 S. W. 580, speaking through Chief Justice FLY, said:

"It is a well settled rule of law that, where a trustee wrongfully converts trust property to his own use, the *cestui que* trust is entitled, in equity, to a personal decree for the value of the property so converted. *Boothe* v. *Fiest*, 80 Tex. 141, 15 S. W. 799; *Silliman* v. *Gano*, 90 Tex. 637 39 S. W. 559, 40 S. W. 391; *Loomis* v. *Satterthwaite*, 25 S. W. 68; *Home Inv. Co.* v. *Strange*, 152 S. W. 510. In addition to the claim of the beneficiary upon the trust estate, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which

the beneficiary may enforce at his election which becomes his only remedy when the trust property has been placed beyond his reach by the wrongful act of the trustee. Pom. Eq. Jur., Sec. 1080. Appellants had sold the property, not only to Gunter, but to other parties, and the land was involved in a perfect mesh of vexatious litigation, into which appellees could not be dragged by men to whom they had intrusted their property. Neither law nor equity would compel them to bring a suit for the property itself under such circumstances, even though they may have believed that the sales were simulated, and that the real title was still in the trustees. Before they could be compelled to look to the property itself, rather than to the trustees, for reimbursement, the property should be in as favorable a condition as it was when placed in the hands of the trustees. They could not be compelled to sue for property loaded down with litigation made possible by the trustees. As said by the Supreme Court in the cited case of *Silliman* v. *Gano:* 'But we are of the opinion that when the trustee has treated the property as his own, and has sold it and thereby passed the legal title, he is in no position to demand that his *cestui que* trust shall proceed against the purchasers; and that by the breach of trust he becomes, in any event, personally liable to make compensation to the beneficiary for his property. It is equitable that the *cestui que* trust should recover of a purchaser with notice, if he elects to do so; but it is inequitable, at least between the trustee and purchaser, that he should be required to proceed against the latter and let the former go free. * * * We are of opinion,

therefore, that when the trustee betrays his trust by a sale of the property the beneficiary can hold him responsible for its value, although he may, if he so elect, be enabled to proceed against the property sold.'

"Appellants seek to have the rule as to the measure of damages in ordinary cases of conversion applied to them; but, as said by the Court of Civil Appeals in the Third District in the case of *Mixon* v. *Miles*, 46 S. W. 105: 'The general rule concerning the liability of trespassers for the conversion of property does not apply in a case of this character, which is to the effect that the value of the property, with interest thereon, at the time of conversion, is ordinarily the measure of damages in such a case. A different principle, we think, obtains in a case like this, where the evidence shows a gross abuse of duty on the part of the trustee.' A writ of error was refused in that case, in a written opinion by the Supreme Court, and as to the measure of damages, citing the case of *Boothe* v. *Fiest*, 80 Tex. 141, 15 S. W. 799, the court said: 'It was held that the measure of damages was either the purchase money for which the land was sold and interest, or the value at the time of the trial, at the option of the plaintiffs less, of course, in either case, the amount of the mortgage debt.' *Mixon* v. *Miles*, 92 Tex. 318, 47 S. W. 966.

"In the cited case of *Boothe* v. *Fiest*, it was held, after quoting from Perry on Trusts (Section 844), 'This rule would indicate that, where the beneficiary sues for compensation, and not for the proceeds of the sale, with interest, the measure of his recovery would be the value of

the land at the time of the trial, and we think such the proper rule in this case'. That was said in a case of violated trust, and citing it and the *Mixon* v. *Miles* case the Supreme Court, in the case of *McCord* v. *Nabours*, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144, held: 'It is objected to the instruction given in connection with the measure of damages that the court of Civil Appeals directs the trial court to assess the value of the land at the time of the trial and to give interest on the sum so assessed from the date when the property was misappropriated by McCord. If this were a proper construction of the opinion, we would hold it to be erroneous, but we are of opinion that the language of the court means nothing more than that when the judgment is entered for the value at the time of the trial that judgment shall bear interest, which would be just the effect the law would give it if the court had not mentioned the question of the interest'.

"Those decisions fixing the measure of damages in cases of broken faith and violated trust are based upon the principle that no man who has trampled upon the trust reposed in him by another, in regard to his property, shall be allowed to reap a benefit therefrom, but shall return to the beneficiary the enhanced value of the property, if such has occurred. It would be putting a premium upon disloyalty and bad faith if a trustee who has breached his trust and converted the property of the *cestui que* trust to his own use and benefit could answer for his breach of the trust by paying a lower value than that at time of trial."

If Dunn and Gillam still held the lease, the recovery against them would be complete, the decree would go for an accounting for all oil or gas and the proceeds thereof received by them from the premises, for the cancellation of the lease and restoration of the property in its improved condition to the ward; but having transferred the lease to the Bull Head Oil Company, an innocent purchaser for value, the lease itself cannot be set aside and the property restored to the ward. The recovery against Dunn and Gillam must therefore be in damages to include all moneys received by them or either of them and the value of the lease at the time of the trial.

Dunn and Gillam having entered into the fraudulent arrangement, and under the rules of equity being treated as trustees *ex maleficio* of the title to the lease, and likewise trustees *ex maleficio* of the stock and of all moneys received by them in the form of dividends, the decree in holding them to an accounting for their wrongful conduct, must of necessity be a joint and several decree, holding each liable for the acts of the other; and hence Gillam would be liable under the decree which must be rendered, for all dividends which Dunn or his wife received, and Dunn would be liable for all dividends which Gillam or his wife received, and also for the seventy-five thousand dollars paid Gillam and his wife by Jake Hamon for stock in the company.

We respectfully submit that this cause should be reversed with instructions to the court below to require a full accounting on the part of Dunn and Gillam and their wives.

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